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# In the Supreme Court of the United States

## OCTOBER TERM, 1934

ATLANTIC COAST LINE RAILROAD COMPANY,
*Appellant,*

vs.

STATE OF FLORIDA AND E. S. MATTHEWS, MAMIE EATON-GREENE, AND W. B. DOUGLASS, ETC., ET AL.,
*Appellees.*

No. 344

STATE OF FLORIDA AND E. S. MATTHEWS, MAMIE EATON-GREENE, AND W. B. DOUGLASS, ETC., ET AL.,
*Cross-Appellants,*

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.,
*Cross-Appellees.*

No. 345

## BRIEF OF CROSS-APPELLANTS

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vs.

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*Appellees.*

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STATE OF FLORIDA AND E. S. MATTHEWS, MAMIE EATON-GREENE, AND W. B. DOUGLASS, ETC., ET AL.,
*Cross-Appellants,* — No. 345

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.,
*Cross-Appellees.*

## BRIEF OF CROSS-APPELLANTS

### REFERENCE TO THE OPINIONS DELIVERED IN THE DISTRICT COURT.

The Court below delivered its first opinion (R. 159), filed January 30, 1933, after the first reference to the Master herein, and thereupon re-referred the causes herein consolidated to said Master, and thereafter delivered its final opinion (R. 349), filed January 26, 1934, in accordance with which the Final Decree of Restitution (R. 383), herein ap-

pealed from, was made on April 14, 1934, and filed April 17, 1934. Neither of the opinions, nor the orders entered in connection therewith, were officially reported.

## REFERENCE TO OFFICIAL REPORTS OF OPINIONS HERETOFORE DELIVERED IN THE SAME PROCEEDING.

This proceeding was in continuation of the cases before the District Court and the Supreme Court of the United States in which opinions had been theretofore rendered as follows:

(a) Opinion of the Supreme Court of the United States, dated January 5, 1931, reported in 282 U. S. 194, cited as State of Florida et al vs. United States of America et al;

(b) Opinion of the United States District Court for the Northern District of Georgia, dated January 17th, 1929, reported in 30 Fed. (2d) 116, and cited as 'State of Florida, et al., vs. United States of America, et al.';

(c) Opinion of the same Court, dated March 22nd, 1929, reported in 31 Fed. (2d) 580, and cited as 'State of Florida, et al., vs. United States of America, et al.'

## STATEMENT AS TO JURISDICTION

On June 12, 1934, the cross-appellants filed and served upon all opposing counsel their typewritten statement as to jurisdiction in compliance with Paragraph 1 of Rule 12 of the Revised Rules of Practice of this Court. On October 8, 1934, this Court noted probable jurisdiction in the case.

## STATEMENT OF THE CASE

The decree here appealed from (R. 383) is an award of restitution, by which these cross-appellants severally are decreed to have and recover of and from the Atlantic Coast Line Railroad Company certain sums specified in the de-

cree. The cross-appeal is taken for the reason that the sums so decreed to be paid are insufficient in amount. A statement of the proceedings prior to the motions for restitution, as well as of the proceedings thereafter had, is essential to an understanding of the contentions of the parties.

**(a) The Proceedings to and Including the Opinion of this Court in the Case of State of Florida et al. v. United States of America, et al., 282 U. S. 194.**

The early history of this controversy is set forth in the opinion of this Court in the case of State of Florida, et al. v. United States of America, et al., 282 U. S. 194. We shall briefly state that history. At the time of the institution of this proceeding a scale of intrastate rates for the transportation of logs in carloads within the State of Florida known as the "Cummer scale" of rates was in effect, which rates "were maintained in intrastate commerce subject to the authority of the state and were published as required by its laws" (282 U. S. 209). The Interstate Commerce Commission had made an order, dated August 2, 1928, requiring the Atlantic Coast Line Railroad Company to establish carload rates for logs within and throughout the State of Florida, which rates were much higher than the "Cummer scale," being on a level approximately twice as high as the level of the "Cummer scale." (The order likewise fixed interstate rates on logs from Florida to Georgia, but since no attack was made upon the interstate rates and no logs have ever moved from Florida to Georgia under the rates so established and all of the logs here involved moved in intrastate commerce in Florida, no further consideration need be given to that feature of the order. Also both the scale of rates so prescribed by the order and the "Cummer scale" were applicable for distances up to 170 miles and were not applicable to walnut, cherry or cedar logs or to logs less than six feet in length, but since all the logs here

involved come within the classification so established, no further point need be made of these exceptions). The order of the Interstate Commerce Commission was to become effective, and because of the failure of the District Court as hereinafter set forth to enjoin it did become effective, on February 8, 1929.

Prior to the effective date of the order of the Interstate Commerce Commission the State of Florida and the members of its railroad commission brought suit in the District Court to restrain the enforcement of the order. A suit for similar relief was brought at the same time by the Brooks-Scanlon Corporation, the Wilson Cypress Company and the Cummer Cypress Company. And a third suit was brought for similar relief by Wilson Lumber Company of Florida.

The three causes were heard together before the specially constituted District Court comprised of Circuit Judge Walker and District Judges Dawkins and Sibley. Upon hearing and rehearing said trial Court sustained the order of the Interstate Commerce Commission and denied the relief sought in said bills of complaint, and dismissed said bills. (State of Florida versus United States, 30 F. (2d) 116; State of Florida versus United States, 31 F. (2d) 580). The Atlantic Coast Line Railroad Company had intervened as a defendant in defense of the order of the Interstate Commerce Commission. Likewise the Georgia Public Service Commission (which had been the original complainant in the proceeding before the Interstate Commerce Commission) intervened as a defendant in defense of the order.

The complainants prosecuted their appeals to the Supreme Court of the United States from the said decrees of the District Court, and on January 5, 1931, this Court by its opinion (282 U. S. 194) and order did order, adjudge and decree that the said decrees of the District Court be reversed and that the portion of the order of the Interstate Commerce Commission with respect to intrastate rates un-

der review in said Supreme Court be set aside, and did order that the said cause be remanded to the said District Court for further proceedings in conformity with said opinion of this Court.

**(b) The Proceedings in the Supreme Court to the Time of the Coming Down of the Mandates.**

On, to-wit, January 23, 1931, and prior to the coming down of the mandates of said Supreme Court, the defendant Atlantic Coast Line Railroad Company did tender for filing in said cause in said Supreme Court a certain motion in which it asserted that since the effective date of the Commission's order (February 8, 1929) large quantities of logs had been shipped over its lines in Florida; and thereupon that Railroad Company therein alleged:

> "Movant represents that it is to the interest of justice that the status fixed by the Commission's order, which has been in effect from the 8th day of February, 1929, as aforesaid, be maintained until the Commission has again considered the record and the cause in the light of this Court's said opinion. It is likely that, if the Court's order becomes effective without further hearing and action by the Commission, it may bring a demand against the Atlantic Coast Line Railroad Company for substantial reparations, and that a failure to have further determination of the subject matter by the Commission may do this movant a great injustice for which there will be no relief, and in the meantime the rates here involved will continue to be an unjust discrimination against interstate commerce and against persons and places and particular classes of traffic, thereby working irreparable damage not only to this movant but to the public."

And in and by said motion said Railroad Company prayed, for the reasons set forth in said motion:

> "That this Court enter such order as it may deem wise, either staying the mandate in this Court until

the Commission has acted in this cause in the light of the opinion of this Court, or until this Court shall, for cause shown, otherwise direct; or,

"That this Court in sending down its mandate to the District Court for the Northern District of Georgia, direct the said Court to maintain the status as to the said intrastate rates now existing until the said Commission shall have acted or until the said Court, for cause shown, shall have otherwise ordered."

On the same day the Georgia Public Service Commission did tender for filing in the Supreme Court a motion of substantially the same import as the motion of said Railroad Company.

The appellants objected to the filing and granting of said motions, and the Supreme Court by its order of January 26, 1931, denied them.

On February 19, 1931, the mandates of the Supreme Court were filed in the District Court in each of the constituent causes. The mandates (R. 1-6), among other things, commanded the District Court that such further proceedings be had in such causes respectively in conformity with the said opinion and decree of said Supreme Court, as according to right and justice, and the laws of the United States ought to be had, the said appeal notwithstanding.

**(c) The Motions of the Complainants for Restitution.**

On February 28 and March 7, 1931, respectively, the complainants respectively filed in said constituent causes their motions (R. 7, 11 and 15) and amendments thereto (R. 20-26) in which they moved for a decree in conformity with said mandates, setting aside the decrees of said District Court which the said Supreme Court had ordered to be reversed, and enjoining, setting aside and annulling so much of said order of the Interstate Commerce Commission as sought to require the said Railroad Company to establish, put in force and maintain said intrastate rates.

And the complainants, the State of Florida and its said Railroad Commission on behalf of all shippers and consignees, respectively, in their said motion (R. 15) in constituent cause No. 514, and the complainants, Brooks-Scanlon Corporation et al and Wilson Lumber Company of Florida, in their respective motions (R. 7 and 11) in constituent causes No. 511 and No. 512 respectively, on their own behalf, did further move the District Court to render a decree against the said defendant Railroad Company to restore to such shippers, consignees and complainants, respectively, the amounts paid by them respectively to said defendant because of the erroneous decrees theretofore entered by the court in said constituent causes.

The complainants, among other things, therein averred that before the reversal of the erroneous decrees which the District Court had entered instead of the decree which the Supreme Court of the United States had said that it should have entered in the first instance, the said shippers and the complainants had been compelled to pay and did pay to the defendant from the effective date of said order of the Interstate Commerce Commission, to-wit, February 8, 1929, for the transportation of logs, the rates so prescribed by said unlawful and invalid order of the Interstate Commerce Commission, and that such rates were in excess of the said lawful State rate (to-wit, the rate known as the "Cummer Scale"), which was in force and effect for the transportation of such logs at the time when such invalid and unlawful order of the Interstate Commerce Commission became effective, and which said invalid and unlawful order purported to supersede. And the complainants averred that if said District Court had entered in the first instance the decree which the Supreme Court of the United States had decreed that the District Court should have entered, such shippers and consignees respectively would have paid to the defendant carrier for the transportation of such logs in intrastate commerce

only said lawful State rates, and that the said intervener and defendant had accordingly benefited from said erroneous decrees in the amounts and to the extent of such excess. And further the complainants averred that such shippers and consignees respectively, having been compelled by said decrees of said District Court to pay such excess, the complainants were now entitled to restitution, with interest.

And likewise, in and by their said motions, respectively, said complainants did further move the District Court generally to retain jurisdiction of the causes respectively and of the parties respectively, to the end that such other and further proceedings might be had, and such further orders and decrees might be entered with respect to restitution, costs and any and all other proper matters as are according to right and justice and the laws of the United States.

**(d) The Responses of the Railroad Company.**

On March 7, 1931, the said defendant Railroad Company did file in said constituent causes in said District Court its responses (R. 27-50) to said motions of the complainants respectively in which it set up some of the confusion and proceedings and litigations which had arisen by reason of the District Court in its first opinion (30 F. (2d) 116) limiting the territorial scope of the order of the Commission to the Northern part of Florida and thereafter (31 F. (2d) 580) upholding the order as applicable within and throughout the entire State, and likewse set up the fact that the Railroad Company had made application to the Commission to re-open the proceedings before it, and averred that the Cummer scale of rates was at all times unjust and unreasonable, and for reasons therein set forth it prayed, among other things, in effect as follows:

> (a) That the mandate of said Supreme Court be not entered in said District Court, but the cause proceed in conformity with the opinon and decree of the

said Supreme Court to the ascertainment of that which should be done, according to right and justice, in accordance with the laws of the United States, and upon such ascertainment such mandate be entered and decree be entered; and

(b) that if the mandates of the said Supreme Court be then entered that such orders and proceedings be had as would preserve the status while the District Court proceed to determine in conformity with said opinion and decree of the said Supreme Court that which was right and just to the parties and to the respondent, and that upon such ascertainment the said District Court enter its orders and decrees accordingly;

(c) that it be determined by the District Court that said defendant was under no obligation to make restitution;

(d) that the several motions filed by the complainants be consolidated for trial and that the complainants be enjoined from undertaking to put in force and effect the State rates (known as the Cummer Scale) which the said order of the Interstate Commerce Commission had sought to supersede;

(e) that the District Court determine that said Cummer Scale of rates is unreasonable, unjust and confiscatory and that its application be enjoined;

(f) to the end that a multiplicity of suits be prevented, that all persons at interest be enjoined from undertaking to enforce any overcharges or claims of restitution against the defendant, except in said proceedings and before the District Court, under such circumstances as the District Court might deem proper;

(g) that it be determined that the Cummer Scale of rates was not in force at any time on or after February 8, 1929, for the reasons therein set forth;

(h) that the District Court enter such other and further orders as might be meet and proper to the end that right and justice be done in said causes in accordance with the opinion of the Supreme Court and the mandates issued therefrom; and for general relief.

On March 7, 1931, the complainants respectively did file in said constituent causes their said motions (R. 50-52) to

strike the said responses of the defendant railroad company, for the reasons therein set forth.

By a first amendment to its response (R. 56-60) the Railroad Company set up other matters relating to the litigations ensuing from the former decisions of the District Court and by a second amendment to its response (R. 60-63) the Railroad Company averred that the Interstate Commerce Commission had, by order dated April 6, 1931, reopened the proceeding before it, and the Railroad Company prayed that the restitution sought "be stayed until the action of the Interstate Commerce Commission in the reopened case." Motions to strike and/or dismiss said amendments were filed by the complainants respectively (R. 60 and 63-65).

**(e) The Orders of the District Court Setting Aside the Order of the Commission and Referring the Matter of Restitution to a Master.**

On March 7, 1931, the said District Court did enter in said constituent causes its decrees (R. 53-56) in which it ordered in effect:

> (a) that the mandates of the Supreme Court be made the judgment of the District Court, and that the same be entered in the minutes of the District Court, and did enjoin, annul and set aside the said portion of the order of the Interstate Commerce Commission which was under review, and did declare that the same was invalid and unlawful; and
>
> (b) that in further pursuance of said mandates directing further proceedings, the pleadings filed in said causes by the complainants seeking restitution and those opposing the same filed by the defendant and seeking equitable relief were reserved for further consideration, the Court retaining jurisdiction for such and other proper purposes.

Thereafter on July 31, 1931, said District Court made and entered its interlocutory order (R. 65-66) in which it adjudged in effect, among other things:

First: That said District Court was without jurisdiction to enjoin rates established by the State of Florida for intrastate traffic or to revise or amend the same, and thereupon by its said order all prayers of the defendant railroad to such intent were dismissed and stricken without prejudice to any relief it might elsewhere be entitled to seek.

Second: The District Court having recited the entry of its erroneous judgments dated January 17, 1929, and April 17, 1929, and the reversal of them by the Supreme Court, and the entry by the District Court of its said order dated March 7, 1931, upon the mandate of the Supreme Court, the District Court did thereupon appoint a special master and direct him, among other things

> "to ascertain and report to this Court the sums severally due to the complainants or other persons represented by the Florida Railroad Commission in this suit by the Atlantic Coast Line Railroad Company as overcharges exacted between said dates by virtue of the said invalid order of the Interstate Commerce Commission, as measured by the difference between the amount collected and the established lawful rate in force at the time each shipment was made, as the Master may find it to have been."

Brooks-Scanlon Corporation et al., complainants in constituent cause No. 511, and Wilson Lumber Company of Florida, complainant in constituent cause No. 512, each in its own behalf, respectively, and the State of Florida and its Railroad Commission, complainants in constituent cause No. 514, in behalf of divers other shippers and consignees, filed with said Master claims, the extent of which was the difference between the transportation charges for the transportation of logs, exacted by the defendant railroad company of such shippers and consignees respectively under color of said unlawful order of said Interstate Commerce Commission on the one hand, and the transportation charges computed upon the lawful State rate (to-wit, said

Cummer Scale), which was in force and effect at the time that said unlawful order of the said Interstate Commerce Commission became effective and which the said invalid and unlawful order of said Commission purported to supersede, on the other hand. The claims amounted to $293,946.23, exclusive of interest, as measured by the difference between the two scales of rates, having been found by the Master to be as follows (R. 94):

| NAME | AMOUNT |
|---|---|
| J. Ray Arnold Cypress Company | $ 2,944.22 |
| American Hardwood Corporation, by C. B. Benedict, Trustee in Bkcy. | 3,033.57 |
| Atlantic Hardwood Corporation | 2,492.91 |
| Brown Brothers Company, No. 1, by J. B. Adkins, Trustee in Bkcy. | 424.10 |
| Brown Brothers Company, No. 2, by J. B. Adkins, Trustee in Bkcy. | 86.95 |
| Brown Hardwood Company | 93.22 |
| Brown Investment Company | 174.40 |
| F. S. Buffum & Company | 1,644.16 |
| Dense Pine Lumber Company | 53.69 |
| Dowling-Camp Lumber Company | 32.34 |
| The Everglades Cypress Company | 4,324.45 |
| Gress Manufacturing Company | 357.21 |
| W. C. Hair, operating as Hair Hardwood Co. | 467.48 |
| Hazzard Brothers | 459.25 |
| Hessler Hardwood Company | 902.01 |
| J. W. Jones Lumber Company | 918.09 |
| Krusen Land & Timber Company | 385.64 |
| Long Leaf Lumber Company | 4,384.61 |
| Putnam Lumber Company | 9,981.40 |
| Southeastern Hardwood Company, successors to Wilson Land & Timber Co. | 1,016.55 |
| Eugene Stacey | 117.11 |
| Eugene Stacey | 408.51 |
| Geo. B. Stallings Company | 153.06 |
| Ben Tillman | 54.26 |
| Thompson-Katz Lumber Company | 388.91 |
| Thompson-Katz Lumber Company | 5,225.60 |

| | |
|---|---|
| Wilson-Otwell Lumber Corporation | 166.30 |
| Cummer Cypress Company | 48,791.40 |
| Wilson Cypress Company | 157,149.41 |
| Wilson Lumber Company of Florida | 41,684.23 |
| Brooks-Scanlon Corporation | 5,631.34 |
| Total | $293,946.23 |

The Railroad Company filed before the Master answers to the claims which admitted that the amounts of the claims, as measured by the difference between the two scales of rates, were correct, but which reiterated the reasons set up in the responses and the amendments thereto why it should not be decreed to pay the complainants any restitution. Objections and replies and motions to strike these answers were filed by the complainants (R. 309-348), in which the complainants set forth at length the proceedings in this case and the proceedings and litigations which arose out of it.

**(f) The Proceedings Before the Master and His First Report.**

Hearings were had before the Master, during the course of which the Railroad Company sought to introduce evidence as to the unreasonableness and unjustness of the Cummer scale of rates. The complainants having objected to this evidence, the Master petitioned the Court for instructions on the subject (R. 67-68). The Court, by order made March 16, 1932, (R. 69-70), passed this decision back to the Master to make. Thereupon the Master admitted this evidence (R. 507, 91), and afterwards, on November 14, 1932, filed his report (R. 70-94), in which, among other things he found in effect:

(a) That all of the proceedings and litigations arising out of this litigation, and relied upon by the Railroad Company as a defense herein, were taken and had solely because of the order of the Interstate Commerce Commission and the decree of the District

Court upholding it and in recognition of the binding and controlling force and effect of that order and that decree, until reversed by the Supreme Court, and that the decision of the Supreme Court having declared the order of the Interstate Commerce Commission invalid and reversed the decree sustaining it, all of those dependent proceedings and litigations should be treated as nugatory and of no force and effect insofar as they might be construed to authorize the Railroad Company to make the charges for the transportation of logs which it had made.

(b) That during said restitution period said Cummer Scale was prima facie "the established lawful rate" for the transportation of logs in intrastate commerce in Florida, but that under Florida law, being only prima facie evidence, the defendent Railroad Company had the right to assert in these restitution proceedings that said rate was unjust, unreasonable, non-compensatory and confiscatory.

(c) That the Cummer Scale was unjust and unreasonable and unenforceable under the Florida statutes, and was unremunerative and invalid under the Constitutions of the State of Florida and of the United States, and on that account was not the "established lawful rate."

(d) That during said restitution period there was no 'established lawful rate' but that the common law obligation to carry at a reasonable rate was the only applicable limit of lawful charges, and that the District Court had jurisdiction to award restitution upon that basis.

(e) That not having been commissioned by his order of appointment to inquire into what would have been a reasonable charge, he made no findings thereon.

**(g) The First Opinion of the District Court.**

Exceptions to said Master's report were filed by the said complainants (R. 107, 122 and 131) and the said defendant (R. 95) respectively. And said cause was heard by said District Court upon such exceptions. And the

contentions of the complainants were, and the said District Court found them so to be (R. 161), that they were severally entitled to have restitution measured by the Cummer Scale, it being a rate voluntarily established, and approved by the said Florida Railroad Commission; but if not, that the Master should be directed to measure it by the said common law standard. And so, on January 30, 1933, the District Court filed its opinion (R. 159-172) and interlocutory order (R. 172-173) in which it found and adjudged the following things, in effect, among others:

(a) That said Cummer Scale was prima facie the "lawful state rate" but under Florida law was prima facie only, and that with respect to the transportation charges exacted in the past the justness and reasonableness of it and whether it was remunerative or confiscatory might be tested in a litigation between shipper and carrier.

(b) That the Cummer Scale was unjust and unreasonable, and under Florida law was unenforceable as the measure of restitution.

(c) That the Cummer Scale was confiscatory and invalid under the Constitutions of the State of Florida and of the United States, and that the constitutional invalidity was fatal to its use in measuring an equitable restitution.

(d) That the court did grant restitution, "but not of the blind and instantaneous sort which settles nothing, but we condition it on a full enquiry which will do justice and give full and final relief to the parties."

"There remains only the common law standard of reasonableness as fixed by the court to be applied. Its application is not rate-making. We have held that we have no jurisdiction in this case to enjoin or set aside a state rate. A commission rate is a legislative act made through a deputy, a law of commerce having only a prospective operation. The ascertainment of a past overcharge is a judicial act in which law is ap-

> plied, not made. Louisville & Nashville R. R. vs. Garrett, 231 U. S. 299; Prentis vs. A. C. L. Co., 211 U. S. 210; Reagan vs. Farmers Loan & Trust Co., 154 U. S. 362, 397. This latter is the thing we will require the master to do on a re-reference, wherein he may consider as evidence for comparison other rates established by due authority as well as other evidence hitherto taken by him and such as may hereafter be offered on this point by either party. It is the ancient issue of quantum meruit. Other issues already decided by him stand closed. An order of re-reference will be taken accordingly." (R. 171-172)

And thereupon, on, to-wit, January 30, 1933, the District Court did enter its interlocutory order (R. 172-173) in which it overruled the exceptions to said Master's report, and confirmed the same so far as it had gone, and except as modified by the said District Court in its said conclusions of law and fact, and re-referred the said cause to the said Special Master, holding, among other things, that:

> "Under the special circumstances of this case we adjudge that the claimants of restitution should have the same only upon condition that they submit to an investigation of the true rights of the carrier to collect for the transportation of their logs during the period covered by the restitution, and submit to such an adjudication as will justly and finally settle the accounts between such claimants and the carrier. To this end we recommit this matter to the master, with direction that he ascertain whether the charge made by the carrier for transportation in each instance was a reasonable one as measured by common law standard, and if not, what was the reasonable charge to be made, and that he measure and award to each claimant restitution accordingly. The master may consider all evidence hitherto taken by him bearing upon the reasonableness of the charge to be made, and may receive such additional

evidence as either party may desire to offer thereon."

**(h) The Further Proceedings Before the Master and His Report Thereon.**

Shortly after the said Order of Re-reference was entered by the said District Court, the said Master held a series of hearings. At the beginning of the first of such hearings the complainants announced that they were proceeding under the said Order of Re-reference and according to said order without waiving any errors which the District Court might have made therein, and that they would conform to said Order of Re-reference made by said District Court with the right to appeal therefrom (R. 738-741). And thereupon and thereafter the complainants and the defendant respectively did adduce before the said Master evidence upon the issues defined in the said Order of Re-reference. Afterwards, on November 7, 1933, the Master filed his report (R. 188-224) under said Order of Re-reference, in which the Master found, among other things, in effect the following:

(a) That the record showed that the cost of transporting the logs when the shipments were made in trainloads (under the circumstances under consideration, to-wit, upon regular schedule from a single point of origin to a single destination) was less than the cost of transporting single carload shipments and less when the shipments were made (to a single destination) not in trainloads but in quantities substantially above single carloads.

(b) That while the Master took into account the volume and cost of the trainload and other heavy movements in determining what would be proper charges applicable alike to all shipments, the Master felt it his duty to fix one scale of charges applicable alike to all shipments, according to weight and distance.

(c) That the charges made by the defendant Railroad Company for shipments of logs over said

railroad in Florida during said restitution period were not proper or lawful charges, but were higher than proper or lawful charges.

(d) That the total principal amount that should be recovered by and for the benefit of the complainants and the claimants for whose benefit claims had been filed with said Master was the sum of $99,941.77 principal amount, or 34% of the total or aggregate principal amount claimed by and on behalf of said claimants respectively.

(e) That each claimant by or on behalf of whom a claim had been filed should recover as principal 34% of the principal amount of his claim, and of each item comprehended therein, together with interest computed at the rate of 8% per annum upon the principal sum of each such item, from and after the time of the making of the shipments out of which such item arose.

**(i) The Final Opinion and Decree of the District Court.**

The claimants and the defendant Railroad Company, respectively, filed exceptions (R. 290, 294, 306 and 225) to said Master's report, and final hearing was had by said District Court.

And afterwards, on, to-wit, January 26, 1934, the District Court did file in said causes its opinion and findings (R. 349-354) in which it overruled all exceptions of all parties to said Master's report and did direct that a decree be prepared upon the basis of the conclusions of law and findings of fact in the original and supplemental reports of the Master. And having entered an order formally consolidating said constituent causes into a consolidated cause (R. 382) the District Court did render a single final decree of restitution (R. 383-387) on April 14, 1934, in which, among other things, the District Court did order, adjudge and decree:

(a) That the defendant Railroad Company ought to restore to the said Brooks-Scanlon Corporation,

Cummer Cypress Company and Wilson Cypress Company, severally (complainants in constituent cause No. 511), and to said Wilson Lumber Company of Florida (complainant in said constituent cause No. 512); and to the said Florida Railroad Commission (complainant in constituent cause No. 514) for the use and benefit of the several shippers specified in said decree, the sums set opposite the names of such complainants and of such shippers, respectively, in said decree, such sums being the amounts (including 34% of the principal of said claims and interest thereon at the rate of 8% per annum computed to April 14, 1934) which the District Court thereby found to have been lost by said complainants and shippers, respectively, by virtue of the failure of the District Court to enjoin and set aside in the first instance the order of the Interstate Commerce Commission which was afterwards enjoined and set aside by said District Court pursuant to the mandates of the Supreme Court of the United States; and

(b) That the said defendant pay to the complainants and said Florida Railroad Commission, severally, the said sums above referred to and that separate executions be issued to them respectively.

### (j) The Appeal and Cross-Appeal

The Railroad Company took a separate appeal from the decree (R. 395-396), the United States, the Interstate Commerce Commission and the Georgia Public Service Commission not having joined in the appeal. The State of Florida and its railroad commission, the Brooks-Scanlon Corporation, the Wilson Cypress Company, the Cummer Cypress Company and the Wilson Lumber Company of Florida took a cross-appeal (R. 415-416) their contentions being, as the District Court found them to be (R. 161), that they are severally entitled to have restitution measured by the Cummer Scale, but if not, that the restitution awarded to them respectively should be measured by the common law standard of reasonableness, and that they

were and are severally thereby entitled to greater sums, respectively, than were awarded to them, respectively, by the said final decree.

## SPECIFICATION OF THE ASSIGNED ERRORS INTENDED TO BE ARGUED.

These cross-appellants filed separate Assignments of Errors in the three cases so consolidated (R. 418, 422 and 427). They intend to argue all of the errors assigned by them in their respective Assignments of Errors. The argument will be set forth under the following headings:

### POINT 1.

The District Court erred in failing and refusing to restore to these appellees and cross-appellants the full amount of the sums claimed by them respectively in the restitution proceedings before said District Court; such sums respectively were benefits which were received by the Atlantic Coast Line Railroad Company under and by reason of the erroneous decrees of the District Court (which decrees were afterwards reversed by the Supreme Court of the United States) and which were received by said Railroad Company by virtue of the failure of the District Court to enter in the first instance the decree which said Supreme Court afterwards adjudged that the said District Court should have entered.

### POINT 2.

These appellees and cross-appellants are entitled to restitution of the full amounts claimed by them respectively, such amounts respectively being the difference between the amounts paid by them respectively to the Atlantic Coast Line Railroad Company for the transportation of logs in Florida in intrastate commerce under the scale of rates prescribed by the unlawful and invalid order of the Interstate Commerce Commission sustained herein by the erroneous decree of the District Court and the amounts which would have been paid by them respectively for such

transportation service under the scale of State rates which was in effect when said invalid order became effective. Said Scale of State rates had been established and had been in effect more than fifteen years and was being maintained subject to the authority of the State of Florida and was published as required by its laws and was in force and effect for such transportation service in Florida when said unlawful and invalid order of the Interstate Commerce Commission became effective and was the scale of State Rates which the said unlawful and invalid order of the Interstate Commerce Commission purported to supersede.

**POINT 3.**

The lawful established rate for the transportation of logs in intrastate commerce in Florida at the time when said unlawful order of the said Interstate Commerce Commission dated August 2, 1928, became effective, was the Cummer Scale of rates. And such was the lawful State rate at the time when the District Court failed and refused to enjoin and set aside the said unlawful order of the Interstate Commerce Commission. It was the duty of the District Court to have set aside in the first instance the said unlawful and invalid order which purported to supersede the Cummer Scale. And upon the reversal of the erroneous decree of the District Court, it became the duty of the District Court to award restitution to the appellees and cross-appellants upon the basis of the Cummer Scale, and to have restored the parties (as far as possible) to the positions which they occupied at the time when the District Court entered its erroneous decree.

**POINT 4.**

The District Court found in effect that all sums collected by the Atlantic Coast Line Railroad Company from the appellees and cross-appellants for the transportation of logs during the restitution period were collected solely by virtue of the invalid order of the Interstate Commerce Commission, which was

upheld by said District Court. When the erroneous decree of the District Court was reversed and the invalid order of the Interstate Commerce Commission was set aside, it became the duty of the District Court to award restitution on the basis of the lawful State rate in force at the time when the erroneous decree was entered, and it became the duty of the Atlantic Coast Line Railroad Company to make such restitution before asserting anywhere in any court any claim against the appellees and cross-appellants with respect to the reasonableness, justness or compensatory or confiscatory character of the said lawful State rate.

**POINT 5.**

When the Supreme Court by its mandate reversed the erroneous decree of the District Court, and when the District Court set aside the invalid order of the Interstate Commerce Commission, the said unlawful order and said erroneous decree and all benefits acquired under them and all proceedings taken pursuant to or on account of them became ineffective as of the time when the said erroneous decree was entered; and the rate applicable to the several shipments of logs involved in these restitution proceedings thereupon became the lawful State rate which had been superseded by the invalid order of the Interstate Commerce Commission, and it was the duty of the District Court to apply such lawful State rate in awarding the restitution here sought.

**POINT 6.**

When the District Court, pursuant to the mandate of the Supreme Court of the United States set aside the invalid order of the Interstate Commerce Commission which had attempted to supersede the State rate, viz., the Cummer Scale, the District Court should have awarded restitution upon the basis of the said State rate and thus righted the wrong which had resulted from its erroneous decree without inquiring or hearing evidence as to whether the said State rate was reasonable or unreasonable, just or unjust, remunerative or confiscatory.

**POINT 7.**

In applying the common law standard of reasonableness in awarding restitution herein upon the issue of quantum meruit, the District Court should have found that the evidence with respect to the circumstances and conditions and costs of the movements of logs (a) consigned from Hines, Florida, to Wilson Cypress Company at Palatka, Florida; (b) consigned from Homosassa, Florida, to Cummer Cypress Company at Lacoochee, Florida; and (c) consigned from Carbur and Perry, Florida, to Brooks-Scanlon Corporation, at Eastport, Florida, respectively, was not such as to overcome the presumption of justness and reasonableness of the Cummer Scale of rates.

**POINT 8.**

In applying the common law standard of reasonableness to the charges for transportation services rendered in the past, the District Court in awarding restitution upon such standard should not have given consideration to (a) the State statutes, or (b) the Federal statutes, which relate to the making of rates to be established for future application.

**POINT 9.**

In applying the common law standard of reasonableness to the charges here involved, the District Court in awarding restitution upon such standard should not have given consideration to discrimination of any sort, either as between persons or localities or as against interstate commerce, under (a) the Florida statutes, or (b) the Federal statutes.

**POINT 10.**

Neither (a) the State statutes, nor (b) the Federal statutes condemn discrimination unless the same be unjust discrimination. All or substantially all the shipments of logs moving, respectively: to the appellee and cross-appellant Brooks-Scanlon Corporation from Perry and Carbur, Florida, to Eastport, Florida; and to the appellee and cross-appellant Wilson Cypress Company from Hines, Florida, to Palatka,

Florida; and to the appellee and cross-appellant Cummer-Cypress Company from Homosassa, Florida, to Lacoochee, Florida; moved in trainload quantities, and under circumstances and conditions and at a cost substantially different from the movements of logs to the other shippers in Florida during said restitution period. Such was the effect of the decision of the District Court dated January 22nd, 1934, filed January 26th, 1934. A lower charge for the transportation of logs from such points of origin to such destinations under such circumstances constitutes no discrimination of any sort. In applying the common law standard of reasonableness the District Court should have awarded restitution to these appellees and cross-appellants upon a basis substantially lower than that generally established, viz., upon a basis not substantially higher than the Cummer Scale.

**POINT 11.**

In applying the common law standard of reasonableness to the charges here involved, the District Court in awarding restitution upon such standard should have awarded to these cross-appellants respectively a greater sum than the sum so awarded to them respectively in and by the final decree herein, viz., not substantially less than the amounts of such overcharges claimed by said cross-appellants respectively.

Points numbered 7 and 10 above are not included among the separate points relied upon by the State of Florida and its railroad commission. In the separate statement of points relied on by the Wilson Lumber Company of Florida those two points are somewhat differently stated, as follows:

**POINT 7.**

In applying the common law standard of reasonableness in awarding restitution herein upon the issue of quantum meruit, the District Court should have found that the evidence with respect to the circumstances and conditions and costs of the movements of the logs consigned to this appellee and cross-appellant

at Perry, Florida, was not such as to overcome the presumption of justness and reasonableness of the Cummer Scale of rates.

**POINT 10.**

Neither (a) the State statutes, nor (b) the Federal statutes condemn discrimination unless the same be unjust discrimination. All or substantially all the shipments of logs moving to this appellee and cross-appellant at Perry, Florida, moved under circumstances and conditions and at a cost substantially different from the movements of logs to the shippers of single carloads in Florida during said restitution period. A lower charge for the transportation of logs to such destination under such circumstances constitutes no discrimination of any sort. In applying the common law standard of reasonableness the District Court should have awarded restitution to this appellee and cross-appellant upon a basis substantially lower than that generally established, viz., upon a basis not substantially higher than the Cummer Scale.

With these variations there is no difference in the contentions of the cross-appellants in these three consolidated causes.

## SUMMARY

By Points numbered 1 to 6, inclusive, above the claimants assert that restitution should be awarded on the basis of the Cummer Scale of rates. That assertion was met in the District Court by the railroad with the contention, among others, that the Cummer Scale was unjust, unreasonable and confiscatory, that the common law prevailed in Florida, that the only legal rates in Florida were such rates as were reasonable, that the lawful rates, or rates prescribed by the Florida Railroad Commission, were prima facie legal rates, but only prima facie so and subject to attack in any controversy between shipper and carrier. The carrier here invoked the Florida law and insisted that restitution should only be awarded upon the

basis of such charges as were reasonable and just. This contention prevailed in the District Court. That Court refused to award restitution on the basis of the Cummer Scale, saying that it would grant restitution only upon charges measured in each instance by the common law standard of reasonableness. When the evidence on that issue was taken the carrier insisted that the charges paid were reasonable and that, even if they should be found to be unreasonably high as to some shipments, a uniform charge should be applied to all or otherwise unjust discrimination would exist. The Master and the Court determined what it found to be a proper charge as applied to all shipments taken together, while recognizing differences to have existed in the transportation services performed and differences in the cost of such services.

We assert that restitution should have been awarded to all the claimants upon the basis of the Cummer Scale, but if not, that restitution should be awarded to them respectively as measured in each instance by the common law standard of reasonableness. We assert with respect to the large shippers, here suing separately in their own right, that the evidence as to reasonableness was not such as to overcome the prima facie validity of the Cummer Scale. We assert that the common law standard required reasonableness of charge and not equality of charge for the services rendered the respective shippers, and that neither the Federal nor Florida statutes affect this. And we further assert that the claimants and shippers severally are entitled to restitution in greater amounts than they were here awarded respectively.

## ARGUMENT

### POINTS 1 TO 6, INCLUSIVE

Points numbered 1 to 6, inclusive, are all directed to the failure of the District Court to grant restitution on the basis of the Cummer Scale. The same law governs and is applicable to all of those points, and we therefore argue them together. Those points are as follows:

**POINT 1.**

The District Court erred in failing and refusing to restore to these appellees and cross-appellants the full amount of the sums claimed by them respectively in the restitution proceedings before said District Court; such sums respectively were benefits which were received by the Atlantic Coast Line Railroad Company under and by reason of the erroneous decrees of the District Court (which decrees were afterwards reversed by the Supreme Court of the United States) and which were received by said Railroad Company by virtue of the failure of the District Court to enter in the first instance the decree which said Supreme Court afterwards adjudged that the said District Court should have entered.

(This point is applicable to Assignments of Error numbered 1, 2, 3 and 4.)

**POINT 2.**

These appellees and cross-appellants are entitled to restitution of the full amounts claimed by them respectively, such amounts respectively being the difference between the amounts paid by them respectively to the Atlantic Coast Line Railroad Company for the transportation of logs in Florida in intrastate commerce under the scale of rates prescribed by the unlawful and invalid order of the Interstate Commerce Commission sustained herein by the erroneous decree of the District Court and the amounts which would have been paid by them respectively for such transportation service under the scale of State rates which was in effect when said invalid order became

effective. Said scale of State rates had been established and had been in effect more than fifteen years and was being maintained subject to the authority of the State of Florida and was published as required by its laws and was in force and effect for such transportation service in Florida when said unlawful and invalid order of the Interstate Commerce Commission became effective and was the scale of State rates which the said unlawful and invalid order of the Interstate Commerce Commission purported to supersede.

(This point is applicable to Assignments of Error numbered 1, 2, 3 and 4.)

**POINT 3.**

The lawful established rate for the transportation of logs in intrastate commerce in Florida at the time when said unlawful order of the said Interstate Commerce Commission dated August 2, 1928, became effective, was the Cummer Scale of rates. And such was the lawful State rate at the time when the District Court failed and refused to enjoin and set aside the said unlawful order of the Interstate Commerce Commission. It was the duty of the District Court to have set aside in the first instance the said unlawful and invalid order which purported to supersede the Cummer Scale. And upon the reversal of the erroneous decree of the District Court it became the duty of the District Court to award restitution to the appellees and cross-appellants upon the basis of the Cummer Scale, and to have restored the parties (as far as possible) to the positions which they occupied at the time when the District Court entered its erroneous decree.

(This point is applicable to Assignments of Error numbered 1 to 8 inclusive.)

**POINT 4.**

The District Court found in effect that all sums collected by the Atlantic Coast Line Railroad Company from the appellees and cross-appellants for the transportation of logs during the restitution period

were collected solely by virtue of the invalid order of the Interstate Commerce Commission, which was upheld by said District Court. When the erroneous decree of the District Court was reversed and the invalid order of the Interstate Commerce Commission was set aside, it became the duty of the District Court to award restitution on the basis of the lawful State rate in force at the time when its erroneous decree was entered, and it became the duty of the Atlantic Coast Line Railroad Company to make such restitution before asserting anywhere in any court any claim against the appellees and cross-appellants with respect to the reasonableness, justness or compensatory or confiscatory character of the said lawful State rate.

(This point is applicable to Assignments of Error numbered 1 to 8 inclusive.)

**POINT 5.**

When the Supreme Court by its mandate reversed the erroneous decree of the District Court, and when the District Court set aside the invalid order of the Interstate Commerce Commission, the said unlawful order and said erroneous decree and all benefits acquired under them and all proceedings taken pursuant to or on account of them became ineffective as of the time when the said erroneous decree was entered; and the rate applicable to the several shipments of logs involved in these restitution proceedings thereupon became the lawful State rate which had been superseded by the invalid order of the Interstate Commerce Commission, and it was the duty of the District Court to apply such lawful State rate in awarding the restitution here sought.

(This point is applicable to Assignments of Error numbered 1 to 8 inclusive.)

**POINT 6.**

When the District Court, pursuant to the mandate of the Supreme Court of the United States set aside the invalid order of the Interstate Commerce Commission which had attempted to supersede the State rate,

viz., the Cummer Scale, the District Court should have awarded restitution upon the basis of the said State rate and thus righted the wrong which had resulted from its erroneous decree without inquiring or hearing evidence as to whether the said State rate was reasonable or unreasonable, just or unjust, remunerative or confiscatory.

(This point is applicable to Assignments of Error numbered 5 to 8 inclusive.)

It will be seen from the foregoing statement of the case that when the decree of the District Court was reversed by the Supreme Court and the unlawful and invalid order of the Interstate Commerce Commission was stricken down, the District Court took the position that it would not grant restitution on the basis of the State rate, viz., the Cummer Scale, because from the evidence that Court took the Cummer Scale to be unjust, unreasonable and confiscatory in its application. The District Court therefore said that it would grant restitution, "but not of the blind and instantaneous sort which settles nothing" (R. 167). Therefore this District Court in the Northern District of Georgia undertook to determine on the merits what the just and reasonable rate for the transportation of logs in Florida ought to have been during the period here involved, and having made such a determination to its own satisfaction entered a decree accordingly. We submit, first, that the Court should have measured the restitution to be awarded to the complainants by the Cummer Scale and that the theory upon which restitution is founded required this.

**The Theory of Restitution Required a Decree in Favor of the Complainants for the Difference Between the Amount Paid and the Amount which would have been Paid if the Right Decree had been Entered in the First Instance Regardless of All Defenses which Might Be Urged.**

The basic principles upon which restitution is founded and administered should have finally and conclusively prevented the Court from inquiring into the reasonableness or unreasonableness, justness or unjustness, of the Cummer Scale and required that the Court put the parties back where they would have been if the Court had entered the correct decree in the first instance.

The Court found that all of the money collected by the Atlantic Coast Line Railroad Company from the claimants was collected by virtue of the intrastate rates made by the Interstate Commerce Commission and upheld by that Court (R. 164). This was the sole warrant for filing the tariffs containing the rates prescribed by the Interstate Commerce Commission (R. 79-80). The testimony of Mr. Perrin, chief witness for the Atlantic Coast Line Railroad Company, is clear and unambiguous upon that point (R. 729). The railroad relied upon that invalid order sustained by this Court as its justification for the charges it made. Beyond all peradventure it was under that order and not otherwise that the benefits were demanded and received by the carrier. The District Court declared that that order could give the railroad no aid or protection. (R. 69).

The Florida log shippers by reason of the failure of the District Court to enjoin and set aside the invalid portion of said order of the Interstate Commerce Commission, were forced by the Atlantic Coast Line Railroad Company during a period of approximately two years to pay many thousands of dollars for the transportation of logs intra-

state within Florida over and above the amounts which they would have had to pay under the existing Florida intrastate rates which the order of the Interstate Commerce Commission purported to supersede. The shippers therefore asked that Court to right the wrong caused by its failure to enjoin and set aside the said invalid and unlawful order of the Interstate Commerce Commission in the first instance. The right to this restitution has been upheld by countless decisions. We shall first discuss one case which conclusively disposes of the right to restitution here and which in our judgment conclusively disposes of every major contention before the Court.

**(1) The Case of Baltimore & Ohio R. Co. v. United States, 279 U. S. 781.**

The most recent decision of the Supreme Court of the United States in which the unqualified right to this relief is passed on is the case of Baltimore & Ohio Railroad Company vs. United States, supra.

A number of carriers with eastern termini at St. Louis, to which we will refer as the West Side Lines, competed with carriers whose lines crossed the Mississippi River to East St. Louis and in the instance of some of the competing lines went further East. There were a number of other carriers which we shall refer to as the East Side Lines, with western termini at East St. Louis, who exchanged freight with the West Side Lines. The Terminal Railroad Association transferred the freight across the river. The West Side Lines, in order to meet the competition of the rail carriers west of the river whose lines reached East St. Louis, made the same rate to both cities and absorbed and bore the cost of transferring the freight across the river. The East Side Lines made the same rate to both cities on most traffic, but on through traffic on combination rates through both cities their rate applied to East St. Louis only. The West Side Lines made complaint to the

Interstate Commerce Commission, and it ordered the East Side Lines to absorb (i.e. to pay for) the transfer charges on all west-bound through traffic moving on combination rates which were made on St. Louis as on East St. Louis. The East Side Lines brought their suit in the District Court for the Northern District of Illinois against the United States, to set aside the Commission's order and the commission and West Side Lines intervened. The District Court, constituted of three judges, dismissed the suit for want of equity. An appeal was had to the Supreme Court of the United States, which reversed the District Court and directed by its mandate that such further proceedings be had in the case in conformity with the opinion and decree as according to right and justice and the laws of the United States ought to be had (B. & O. R. R. Co. vs. U. S. 277 U. S. 291.)

When the mandate came down, the East Side lines applied for decrees in conformity with it, averring that by reason of the erroneous dismissal of the suit they had been compelled up to the time the decree of reversal went into effect, to comply with the Commission's order from its effective date and, in accordance therewith had paid the transfer charges covered by the order. They prayed that the decree require the West Side Lines severally to restore to the respective East Side Lines the amounts which because of the erroneous decree of dismissal they had paid, and asked for a Master to ascertain the amounts. The District Court, consisting of three judges as before, vacated its earlier decree and set aside the Commission's order. It found that the East Side Lines had complied with the Commission's order as alleged, retained jurisdiction of the case, and later entered a final decree denying the application for restitution and for reference to a Master. A direct appeal was then had to the Supreme Court of the United States from that final decree.

We have examined the briefs of counsel and the trans-

cript of record in the case. The West Side Lines in their brief raised every point that could be raised by the Atlantic Coast Line Railroad Company here in resisting this application for restitution. They asserted that in all prior cases where restitution was granted by the Court either: (a) an affirmative decree was entered by the trial court; or (b) plaintiff invoked the Court's jurisdiction in the first instance and enforced the decree or judgment by execution or other coercive process; that there was no authority for restitution in cases where the trial Court had declined to grant an injunction. They further asserted that in all previous cases where restitution had been granted, the courts therein involved had general equity powers while the three-judge statutory court had only limited powers under the statutes. They raised the further point that there was no supersedeas or stay of proceedings pending appeal. They further asserted that payment of the charges involved resulted primarily from the Commission's order and not from any District Court order in the first instance, that what was done was not done under the process of the District Court but by reason of the Commission's order and that the West Side Lines did not invoke the jurisdiction of the District Court to force observance to the Commission's order but that the suit was commenced by the East Side Lines. They asserted that the Commission's order was legislative in character and that so long as it was in force it was binding on all parties and was to be treated as though it were a statute enacted by Congress and that in such circumstances any damage suffered by the East Side Lines was damnum absque injuria. *It was further contended by the West Side Lines that issuance by the District Court of an order for restitution would have necessitated determination by that Court of the question as to which lines ought reasonably to pay the bridge tolls at St. Louis, Missouri, a matter asserted to be peculiarly for determination by the Commission itself.*

The West Side Lines also filed a motion to dismiss the appeal on the ground that under Judicial Code 238, a direct appeal to the Supreme Court of the United States could not lie from the refusal of the District Court to grant restitution. The Supreme Court brushed all these contentions aside and reversed the District Court. The opinion of the Supreme Court was rendered by Mr. Justice Butler, and we here quote from it at length.

> "There is no question as to the jurisdiction of this court on the first appeal or as to the validity of its mandate. The present controversy concerns the construction and effect to be given to the mandate.
>
> "Appellants' application for restitution was in effect an equity proceeding resulting in a final decree. Perkins v. Fourniquet, 14 How. 328, 330, 14 L. ed. 441, 442. Where a lower federal court refuses to give effect to, or misconstrues, our mandate, its action may be controlled by this court, either upon a new appeal or by writ of mandamus. Re Potts, 166 U. S. 263, 265, 41 L. ed. 994, 995, 17 Sup. Ct. Rep. 520; Re Sanford Fork & Tool Co., 160 U. S. 247, 255, 40 L. ed. 414, 416, 16 Sup. Ct. Rep. 291, and cases cited. It is well understood that this court has power to do all that is necessary to give effect to its judgments. The act authorizes this appeal.
>
> "Moreover the proceeding below out of which the denial of restitution arose is incidental to and in effect a part of the main suit. Under the act, a court of three judges was required for the entry of the decree on the mandate. Ex parte United States, supra (226 U. S. 424, 57 L. Ed. 284, 33 Sup. Ct. Rep, 170); Ex parte Metropolitan Water Co. 220 U. S. 539, 544, 55 L. Ed. 575, 577, 31 Sup. Ct. Rep. 600. The jurisdiction of the court so constituted necessarily includes power to make all orders required to carry on such suits and to enforce the rights and obligations of the parties that arise in the litigation. This appeal rests on the same foundation as did the first. Arkadelphia Mill Co. v. St. Louis Southwestern R. Co. 249 U. S. 134, 142, 63 L. Ed. 517, 523, P. U. R. 1919C, 710, 39 Sup. Ct. Rep. 237.

"The East Side Roads are entitled to restitution. The order should have been set aside in the first instance. As a result of the erroneous refusal of the court, the burden of the transfer charges in question was shifted from the west-side roads to the east-side roads, and was by them borne until the order was set aside on the reversal of the decree dismissing the bill. All payments made by appellants in compliance with the invalid order inured to the benefit of the west-side roads just as if made directly to them.

"The right to recover what one has lost by the enforcement of a judgment subsequently reversed is well established. And while the subject of the controversy and the parties are before the court, it has jurisdiction to enforce restitution and so far as possible to correct what has been wrongfully done. Northwestern Fuel Co. v. Brock, 139 U. S. 216, 219, 35 L. Ed. 151, 153, 11 Sup. Ct. Rep. 523; Arkadelphia Mill Co. v. St. Louis Southwestern R. Co. supra (249 U. S. 145, 63 L. Ed. 524, P. U. R. 1919C, 710, 39 Sup. Ct. Rep. 237); Ex parte Lincoln Gas & E. Light Co. 256 U. S. 512, 516, 65 L. Ed. 1066, 1069, 41 Sup. Ct. Rep. 558. When the erroneous decree was reversed and the invalid order was set aside, the law raised an obligation against each of the west-side roads to make restitution of the payments made by the east-side roads in compliance with the order. And thereupon each of the east-side roads became entitled to have the amounts so paid by it together with interest thereon from the dates of such payments at the rate established by the law of the state in which such sums were paid.

"Before the reversal of the erroneous decree, there was transferred across the river a very great number of shipments covered by the order. The transfer charge on each constitutes a claim in favor of an east side road and against a west side road. If each claim is treated as a separate cause of action enforceable only at law, the number of suits and the burden of maintaining them would be so enormous that the relegation of the east side roads to that remedy would be a virtual denial of justice. It was the duty of the court to retain

jurisdiction of the case, enter a decree that appellants are entitled to restitution, and refer the case to a master as prayed in appellants' motion. Ex parte Lincoln Gas & E. Light Co. supra, 517 (41 S. Ct. 558)"

The B. & O. case is so clearly on all fours with the case at bar and so conclusively disposes of every contention that might conceivably be urged against the granting of restitution by the Court that there should be no need for these cross-appellants to cite further authorities. There, as here, the District Court refused to enjoin and set aside an unlawful order of the Commission; there, as here, the Commission's order was in effect for a considerable period of time during the course of the litigation; there, as here, the parties against whom restitution is sought came before the Court voluntarily as intervening defendants. In some respects the position of the plaintiffs in the case at bar is stronger than was the position of the East Side Lines in the B. & O. case. In that case the amounts sought to be recovered had been paid to an outside third party, the Terminal Association, and not to the West Side Lines. In the case at bar, the amounts sought to be recovered were paid directly to the Atlantic Coast Line Railroad Company.

We call to the attention of the court the fact that it was strenuously insisted that no restitution could be granted because the decree of the court was a negative decree, that is, a decree declining to enjoin the order of the Commission, just as the decree here declined to enjoin the order of the Commission. But this court was not impressed with that contention. The particular three-judge District Court which heard the case at bar is the sole instrumentality set up by Congress for the testing of the validity of the order of the Commission. The attack must be made in that Court and that Court must by its decree determine the order to be valid or invalid. Indeed in such a case the decree of the Court while in form negative is in effect affirmative, for it upholds the order of the Commission and endows it with the

attributes of the law of the land so long as the erroneous decree is unmodified and unreversed. Under such a decree the order of the Commission is equivalent to the process of the Court under an affirmative decree, whereas if the court enters an affirmative decree the order of the Commission is a nullity. The Court looks to the purpose and effect of the proceeding and decree rather than its form, and the Baltimore and Ohio case disposes of any contention that restitution in such a proceeding is any different from the ordinary proceeding for restitution where there has been a decree affirmative in form and money collected under the process of the Court.

The Court in the case at bar undertook to distinguish the Baltimore & Ohio case by saying (R. 165):

> "In Baltimore & Ohio R. R. Co. v. United States, 279 U. S. 781, where, as in this case, the three-judge Court had acted negatively, refusing to interfere with an order of the Interstate Commerce Commission, on reversal jurisdiction to award restitution was affirmed and the amount ascertained by a master. Only the parties to the record were involved, and there was no difficulty in measuring the amount to be returned, for it was the entire amount collected. There was no danger of doing further wrong."

On the contrary when restitution was ordered in the Baltimore & Ohio case the court made no inquiry into the question of which side ought reasonably to have paid the charges, but ordered restitution on the basis of the arrangement which was in effect at the time when the Court should have entered the right decree in the first instance.

### (2) The Other Decisions of This Court on the Subject of Restitution.

These claimants submit that the Baltimore & Ohio case is conclusive of their rights in the premises. However, it may be well to cite some other decisions of the Court in

which this relief has been accorded. As far as we have been able to discover there is no respectable authority to the contrary.

The authorities in this Court, in addition to the Baltimore & Ohio case, which we have above set forth at length, upon the subject of restitution are the cases of:

Northwestern Fuel Company v. Brock, 139 U. S. 216;

Arkadelphia Milling Company v. St. Louis, S. W. Ry., 249 U. S. 134; and

Ex parte Lincoln Gas & Electric Light Co., 256 U. S. 512.

The basic principle upon which the Court acts was stated by Mr. Justice Field in the case of Northwestern Fuel Co. v. Brock, supra, as follows:

> "and the power is inherent in every court, whilst the subject of controversy is in its custody and the parties are before it, to undo what it had no authority to do originally, and in which it therefore acted erroneously, and to restore, as far as possible, the parties to their former position."

In the last mentioned case the plaintiff had recovered a judgment upon a contract in the lower court and collected certain sums upon the execution. On appeal it was decided that the Federal Court had no jurisdiction of the case. The mandate being returned to the lower court, the defendant there proved that the plaintiff had collected the above mentioned sums upon the judgment and asked restitution. The lower court, although without jurisdiction in the case, entered a judgment requiring the plaintiff to return the sums so collected to the defendant. This was appealed to the Supreme Court. It was insisted that, the reversal of the original judgment having been for want of jurisdiction, the court had no authority to act further in the

matter than as directed by the mandate, and that went only to the reversal of the judgment and the collection of costs in the appellate court. But the Supreme Court said,

> "Jurisdiction to correct what had been wrongfully done must remain with the court so long as the parties and the case are properly before it, either in the first instance or when remanded to it by an appellate tribunal. The right of restitution of what one has lost by the enforcement of a judgment subsequently reversed has been recognized in the law of England from a very early period, and the only question of discussion there has been as to the proceedings to enforce the restitution."

The Court then discussed various cases in which the matter had theretofore been clearly decided, and concluded:

> "The same doctrine is sustained in the several state courts of the country, all recognizing the power of a court, whose judgment is set aside on its own motion or reversed by order of an appellate tribunal, to direct restitution as far as practicable, of all property and rights which have been lost by the erroneous judgment."

Mr. Justice Brewer concurred specially in the opinion, saying that he had thought the law to be otherwise, but that the results were so manifestly equitable, he was glad to know he was mistaken.

Bear in mind that the fact that a judgment was originally entered by the lower court upon the plaintiff's claim strongly indicates the equity and justness of the plaintiff's claim. And bear in mind also that the case was reversed solely for want of jurisdiction. But the Court did not inquire into the merits of the plaintiff's claim when restitution was sought. Neither the merits of the case nor want of jurisdiction in the case were permitted to stand in the way of complete restitution by the Court of every benefit received under its erroneous decree.

In the case of Arkadelphia Milling Co. v. St. Louis, S. W. Ry. Co., supra, it appeared that an attack had been made by the railroad companies in the Federal Court upon certain intrastate rates of Arkansas on the ground that such rates were unreasonable, unjust, discriminatory, confiscatory, etc. The jurisdiction of the Federal Court was invoked solely upon the ground that a constitutional question was involved. Final decrees and permanent injunctions were granted the railroads in the lower court. On appeal, the Supreme Court of the United States condemned the method of apportionment between interstate and intrastate costs used in the cost studies and declared that it was incumbent on the railroads to establish the invalidating facts by definite and convincing proof (Allen v. St. Louis, I. M. & S. R. Co., 230 U. S. 553). Accordingly the Supreme Court reversed the lower court, with directions to dismiss the bills without prejudice. In the lower court, the State Railroad Commission requested restitution on behalf of all shippers, and restitution was made by the Court of the difference paid by the shippers between the rates prescribed by the State Railroad Commission and those put in force by the railroad companies, the court saying:

> "But in our opinion, this portion of the claims is allowable against the railway companies themselves upon the principle long established and of general application that a party against whom an erroneous judgment or decree has been carried into effect is entitled, in the event of a reversal, to be restored by his adversary to that which he has lost thereby. This right, so well founded in equity, has been recognized in the practice of the courts of common law from an early period. Where plaintiff had judgment and execution and defendant afterwards sued out a writ of error, it was regularly a part of a judgment of reversal that the plaintiff-in-error 'be restored to all things which he has lost by occasion of the said judgment'; and thereupon, in a plain case, a writ of restitution issued at once; but if a question of fact was in doubt, a writ

> of *scire facias* was first issued * * *. It is one of the equitable powers inherent in every court of justice so long as it retains control of the subject matter and of the parties, to correct that which has been wrongfully done by virtue of its process". (Citing numerous cases).

It should be noted that when the claim for restitution was urged the Court made no inquiry as to the reasonableness or confiscatory nature of the rates, but merely directed that all sums be restored which had been collected under or by virtue of the erroneous decree.

In the case of Ex parte Lincoln Gas & Electric Light Co., supra, it appeared that the Supreme Court on a former appeal by the Lincoln Gas & Elec. Light Co. (250 U. S. 256) had sustained a decree of the District Court dismissing an attack by the gas company upon rates fixed by an ordinance, although the mandate directed certain modifications to be made in the decree of the District Court and dismissed the bill "without prejudice" and directed "proceedings to be had in said cause as according to right and justice and the laws of the United States ought to be had".

On the filing of the mandate the District Court entered an order modifying its decree as required and retained jurisdiction for the purpose of requiring the Company "to make refund and restitution to consumers of gas for all amounts collected over and above the legal rate pending the litigation, with interest". The Gas Company attempted to appeal from this order but the appeal was dismissed for lack of finality (253 U. S. 477), and, to avoid complying with the order of the District Court referring the cause to a master to ascertain the excess amounts preparatory to entry of an order for restitution, the Gas Company obtained leave from the Supreme Court to file its petition for writ of mandamus "to command the Judge of the District Court to nullify and revoke the above mentioned orders and refrain from assuming jurisdiction over the cause as aforesaid".

All during the litigation except for a short time the operation of the city ordinance respecting gas had been superseded by reason of the appeal taken and appeal bond given by the Gas Company.

On page 516 of its opinion the Supreme Court said that the principal contention upon which the petition for mandamus was rested was that under the Court's mandates, no jurisdiction was conferred upon the District Court to take any action except to affirm its decree and to dismiss the bill of complaint after modifying the decree in the two particulars specified. The Court said:

> "To retain jurisdiction for the purpose of requiring that restitution be made according to the terms of the bond was and is a necessary part of the duty of the District Court under the mandate. The case is within the principle of Arkadelphia Milling Co. v. St. Louis Southwestern Ry. Co., 249 U. S. 134, 143-147, 63 L. Ed. 517, 523-525, P. U. R. 1919C, 710, 39 S. C. Rep. 237. The contention that the jurisdiction fails because the consumers were not parties to the record nor in privity with the parties, and the company prayed no relief against them, is transparently unsound."

The Gas Company then contended that the adjudication in the final decree of the lower court (made September 23, 1915) sustaining the validity of the ordinance fixing the gas rate did not extend beyond the date of that final decree and that thereafter changed conditions, increased costs, and other circumstances might have rendered the rate non-compensatory and the ordinance therefore confiscatory, and that the Gas Company, before being called upon to make restitution ought to have a hearing upon this question as to the period subsequent to that final decree. The mandate of the Supreme Court in the main litigation had not returned to the lower court until January 5, 1920, after which the proceedings for restitution had been started.

But the Court refused to listen to this contention, saying:

"The contention overlooks the effect of the ordinance which is presumptively valid, and has continuing force unless and until set aside by judicial decree as the result of an investigation, in which the burden of proof is upon the company; that the decree of September 23, 1915, is conclusive evidence that the company has made such an attempt, and has failed; and that the ordinance rate not only is lawful and binding, but will so continue unless and until the company, under the "without prejudice' clause shall begin a new suit and maintain its contention that the rate, through changed conditions, has become noncompensatory".

On petition for rehearing (257 U. S. 6, 66 L. Ed. 101) the Gas Company pointed out that it had filed a new suit on January 6, 1920, attacking the rate as confiscatory and had obtained a restraining order therein and urged this as showing that the rate was confiscatory during the period when restitution was sought and that restitution should therefore not be granted.

The Supreme Court said in reply to this contention:

"*The beginning of the new suit, and the granting of a restraining order therein, can properly have effect only with respect to the then future operation of the ordinance, and cannot affect the measure of recovery to be applied by the District Court in awarding restitution for the period covered by the former suit;* much less its jurisdiction to award such restitution."
(Italics supplied).

In that case the Gas Company sought to raise retroactively the same issue of confiscation which the railroad company has here sought to raise retroactively and both the District Court and the Supreme Court declared it to be no defense and refused to even examine into the issue so sought to be raised.

And as early as the case of Bank of Washington v. Bank of United States, 31 U. S. (6 Pet.) 8, the Court said:

"On the reversal of the judgment, the law raises

an obligation in the party to the record, who has received the benefit of the erroneous judgment, to make restitution to the other party for what he has lost. And the mode of proceeding to effect this object must be regulated according to the circumstances. Sometimes it is done by a writ of restitution without a scire facias, when the record shows the money has been paid and there is a certainty as to what has been lost. In other cases a scire facias may be necessary to ascertain what is to be restored."

This is the theory to which the decisions of this Court have consistently adhered. The whole theory and intent of the doctrine of restitution is to restore the parties to the position they occupied at the time of the entry of the erroneous decree, and to require the beneficiary of that erroneous decree to restore to his adversary all benefits of every character which he shall have received under it. When the Court in the performance of its duty undertakes to restore the parties to their former positions, those wronged are entitled to the benefit of the state rates which were found by this Court to have been maintained under the authority of the State of Florida, and published as required by its laws, and in effect at the time that the District Court should have entered the correct decree.

The District Court, while recognizing these decisions, made some attempt to distinguish them by saying (R. 166-167) on the authority of two early state court decisions, that restitution was more a matter of conscience than of right, and that in the cases we have above cited the Court said that no further wrong should be done and that restitution was consistent with the principles of equity.

What might have been said or done by any party litigant had the District Court entered the correct decree in the first instance is beside the point. The carrier is the beneficiary of that wrong decree, and any other equities that may exist between the shippers and the carrier with respect to the reasonableness of the state rate or any other matters were

no concern of that Court. The sole thing with which that Court was concerned was the restoration and restitution of that which was thereby lost, and the correction of the wrong done in consequence of its former decree. In such circumstances no defense is available on the part of one who received the emoney and no justification can be given by the Court.

**The Propriety of Judicial Inquiry Into the Level of the State Rate.**

The foregoing decisions of this Court on the subject of restitution are clear and unambiguous. And under those decisions our conviction is that it was the duty of the District Court to have measured the restitution awarded as hereinabove set forth, without inquiry into the level or propriety of the State rate. This is true upon the further principle, well established in this Court, that the Federal courts will not inquire into the reasonableness of a State-made rate (even one for future application) until State administrative authority has been first applied to and the relief there finally denied.

Gilchrist vs. Interboro Rapid Transit Co., 279 U. S. 159, and cases cited.

But the railroad company in the Court below asserted that the principles laid down in the restitution and other decisions of this Court cited above were inapplicable and urged that the rights of the parties must be determined by Florida law and invoked among others the following Florida decisions:

Pensacola & Atlantic R. R. Co., vs. Florida, 25 Fla. 310;
Cullen vs. S. A. L. R. R. Co., 63 Fla. 122;
La Floridienne vs. A. C. L. R. R. Co., 63 Fla. 208,

to the effect that the rates prescribed by the Florida Rail-

road Commission are under the Florida statute *prima facie* valid and enforceable, and that in a controversy between state authority and the railroad, or between a railroad and a shipper, the prima facie validity may be overcome by evidence to the effect that the State rate was unreasonable or confiscatory, even in cases instituted by the shipper against the carrier for overcharges (Cullen vs. S. A. L. R. Co., supra). The District Court took that view of the law, citing those Florida cases (R. 167-169) and made inquiry into the reasonableness of the State rate and held that the State rate was not in force and effect during the restitution period because it was unreasonable and confiscatory (R. 170). The Court found (R. 161):

> "The claimants contend that they are severally entitled to have restitution measured by the Cummer Scale, it being a rate voluntarily established and approved by the Florida Commission, the Court having no power to go behind it; but if not, that the Master should be directed to measure it by the common law standard."

The Court accordingly awarded restitution to be measured by the common law standard and directed the Master to determine "in each instance" what would be a reasonable charge (as distinguished from a rate) for the transportation services performed during the restitution period (R. 172). As has been pointed out, the Master found, and the District Court confirmed his findings, that the charge exacted during the restitution period was unreasonable and fixed a (sic) reasonable charge, applicable alike to the transportation service performed for all shippers, trainload as well as carload, from all points of origin to all destinations. Pursuing the District Court's construction of the law, we say that as regards certain shippers transporting large quantities of logs between certain points of origin and certain destinations, (who filed *separate* motions for restitution), the evidence was not only not such as

would overcome the prima facie validity of the Cummer Scale, but was also such as to require the charge to be fixed for the transportation service rendered them at a figure not in excess of the Cummer Scale considered from the aspect of the common law standard upon an issue of quantum meruit. That contention will be the subject of the next point of our argument.

## POINT 7.

**IN APPLYING THE COMMON LAW STANDARD OF REASONABLENESS IN AWARDING RESTITUTION HEREIN UPON THE ISSUE OF QUANTUM MERUIT, THE DISTRICT COURT SHOULD HAVE FOUND THAT THE EVIDENCE WITH RESPECT TO THE CIRCUMSTANCES AND CONDITIONS AND COSTS OF THE MOVEMENTS OF LOGS (A) CONSIGNED FROM HINES, FLORIDA, TO WILSON CYPRESS COMPANY AT PALATKA, FLORIDA, (B) CONSIGNED FROM HOMOSASSA, FLORIDA, TO CUMMER CYPRESS COMPANY AT LACOOCHEE, FLORIDA; AND (C) CONSIGNED FROM CARBUR AND PERRY, FLORIDA, TO BROOKS-SCANLON CORPORATION, AT EASTPORT, FLORIDA, RESPECTIVELY, WAS NOT SUCH AS TO OVERCOME THE PRESUMPTION OF JUSTNESS AND REASONABLENESS OF THE CUMMER SCALE OF RATES.**

**(This point is applicable to Assignments of Error numbered 9, 10 and 11 of Brooks-Scanlon Corporation, et al.)**

This point is made as above stated on behalf of Brooks-Scanlon Corporation, Wilson Cypress Company and Cummer Cypress Company in their separate suit which has been here consolidated. The same point is made in similar language by Wilson Lumber Company of Florida in its separate suit here consolidated, viz.:

**IN APPLYING THE COMMON LAW STANDARD OF REASONABLENESS IN AWARDING RESTITUTION HEREIN UPON THE ISSUE OF QUANTUM MERUIT, THE DISTRICT COURT SHOULD HAVE FOUND THAT THE EVIDENCE WITH RESPECT TO THE CIRCUMSTANCES AND CONDITIONS AND COSTS OF THE MOVEMENT OF THE LOGS CONSIGNED TO THIS APPELLEE AND CROSS-APPELLANT AT PERRY, FLORIDA, WAS NOT SUCH AS TO OVERCOME THE PRE-**

SUMPTION OF JUSTNESS AND REASONABLENESS OF THE CUMMER SCALE OF RATES.

**(This point is applicable to Assignment of Error numbered 9 of Wilson Lumber Company of Florida).**

This point is not made by the State of Florida, and its Railroad Commission, representing the various small shippers, in its separate suit here consolidated, although as hereinafter set forth it makes the point that the restitution awarded such shippers as measured by the common law standard is insufficient, and much of the argument here is applicable to that point.

**The Difference Between the Claims of Brooks-Scanlon Corporation, Wilson Cypress Company and Cummer Cypress Company and Those of Wilson Lumber Company of Florida and Those Represented by the State of Florida and Its Railroad Commission.**

We have hereinabove shown that the claims here presented aggregated the principal sum of $293,946.23. Of that amount the claims of the individual lumber companies here suing in their own right are as follows (R. 94):

| | |
|---|---|
| Brooks-Scanlon Corporation..... | $ 5,631.34 |
| Wilson Cypress Company..... | 157,149.41 |
| Cummer Cypress Company..... | 48,791.40 |
| Wilson Lumber Company of Florida | 41,684.23 |

The claims represented by the State of Florida and its Railroad Commission are 27 in number and aggregate the principal amount of $40,690.00 (R. 94).

The claims of the Wilson Cypress Company, more than half in amount of all the claims here involved, arose out of shipments of logs in trainload quantities, in trains of 40 to 45 cars shipped every other day, from Hines, Florida, to Palatka, Florida, a distance of 119 miles. The method of handling these shipments was described by the President of that Company (R. 837-838). The record there shows

that the lumber company took the empty cars into the woods on its logging tracks and loaded them. It then placed them in a switch at Hines (which was the nearest shipping point to the woods). The railroad company then hooked on a caboose at one end of the train and a locomotive at the other and hauled the train to Palatka (the site of the mill of the lumber company). There it cut the train in two, delivered one-half of the cars to the mill where they were unloaded, and removed the empty cars and delivered the other half of the cars. When they had all been unloaded, the railroad company returned the empty cars to Hines in a solid trainload. The contract between the railroad company and the lumber company (Former Record, 329-334)* for this log movement shows this method of handling and provides for the trainload shipment every other day. It should also be observed that part of the cost of repairs to the cars and inspection is by that contract placed upon the lumber company. During the period here involved the Wilson Cypress company paid $15,317.43 for such repairs and also paid half of the cost of inspection at Hines (R. 837-838). Likewise the contract required the lumber company to ship the outbound products of the logs over the lines of the railroad company and its connections unless the charges of the railroad company for such shipments were higher than "the lawfully published rates for like transportation of similar shipments over the lines of other transportation companies" (Former Record, 334). The shipments of this lumber over the railroad was shown and it was demonstrated that the average length of the outbound haul of the lumber was 381.6 miles (R. 769-770).

The claims of the Cummer Cypress Company, or the bulk of them, arose out of shipments of logs in trainload quan-

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*We shall herein refer to the record upon the appeal decided by the opinion of this Court reported at 282 U. S. 194, as (Former Record,—)

tities, in trains of not less than 25 cars shipped every other day, from Homosassa, Florida, to Lacoochee, Florida, a distance of 68 miles. The contract for the handling of these trains is in evidence (Pages 51-55 of Exhibits) and the actual method of their handling was described by an official of the company (R. 826-828). The contract and the handling were similar to that in the case of Wilson Cypress Company above described. The outbound lumber was shipped over the railroad for an average haul of 307 miles (R. 827-828).

The claims of the Brooks-Scanlon Corporation arose out of shipments of logs in trainload quantities, in trains of from 42 to 46 cars shipped at the rate of nine trains a week, from Carbur, Florida, and Perry, Florida, to Eastport, Florida, distances of 143 and 169 miles respectively. Only a few trains were shipped after the effective date of the order of the Interstate Commerce Commission, as that Company dismantled its mill and moved to the woods because of that order (R. 865-866). The contract for the shipment of these log trains is in evidence (Former Record, 261-268), although it was actually made with the Carpenter-O'Brien Company, the predecessor of the Brooks-Scanlon Corporation.

The claims of the Wilson Lumber Company of Florida arose out of shipments from various points of origin in Florida to Perry, Florida, the site of its mill. The shipments were not in trainloads but were in heavy volume.

The claims represented by the Florida Railroad Commission here were single car shipments of logs between various points in Florida, ranging in amount from $32.34 (the claim of Dowling-Camp Lumber Company) to $9,981.40 (the claim of Putnam Lumber Company) (R. 94).

Thus well over half of the claims here involved arise out of shipments in trainload quantities. Those movements were in great volume, with heavy loading to the car, moved on regular schedules, and involved substantially no

terminal services. The difference between such shipments and casual shipments of one or a few cars is readily apparent.

**The Opinions of the District Court and the Report of the Master with Respect to the Restitution Recoverable by the Trainload Shippers.**

As we have pointed out, these cross-appellants on the original reference resisted the inquiry as to the reasonableness of the Cummer Scale. They asserted that restitution should be made without that inquiry. The railroad was however permitted to introduce its evidence upon that subject and the District Court in its opinion on the first reference said (R. 167-170):

> "The shippers here admit that their right is to have, not what they have paid, but what they have lost by the court's failure originally to enjoin the federal rate, the loss being the payment less what the carrier otherwise might at the time have collected. The Cummer Scale is prima facie what the carrier could have charged, but not conclusively so for several reasons. In the first place, being a Florida State rate, it must be tested by Florida law. According to the common law which is in force in Florida, except as changed by statute, a carrier's charges when not fixed by law or a contract are to be reasonable charges to be judged by any court before which a controversy arises over them. 10 C. J., Carriers, Sec. 694; Chicago, etc., R. R. vs. Iowa, 94 U. S. 161. By Comp. Gen. Laws of Florida of 1927, Sec. 6698, common carriers are prohibited to charge more than a fair reasonable rate of toll or compensation. By Sec. 6703 (1), (2), the Railroad Commission is directed to make reasonable and just rates of freight and passenger tariffs to be observed by all common carriers, and reasonable and just rules to enforce their observance. By Sec. 6721 the Commissioners are required to make for each common carrier a schedule of just and reasonable rates on its lines, revising it as necessary from time

> to time, and it is enacted that the schedule 'shall in all suits brought against any common carrier wherein is involved the rates of any common carrier for the transportation of freight, etc., be deemed and taken in all the courts of this state as prima facie evidence that the rate fixed in such schedule or schedules are just and reasonable rates.' There is no special provision for testing or attacking the rates, but the general powers of the courts alone are available."

The District Court therefore concluded (R. 170): "We hold the Constitutional invalidity of the Cummer Scale is fatal to its use in measuring an equitable restitution," and in its order re-referring the cause to the Master said (R. 172):

> "To this end we recommit this matter to the master, with direction that he ascertain whether the charge made by the carrier for transportation in each instance was a reasonable one as measured by common law standard, and if not, what was the reasonable charge to be made, and that he measure and award to each claimant restitution accordingly."

Upon this re-reference the cross-appellants produced their testimony with respect to the reasonableness of the rate to be established for the service rendered. All of the voluminous testimony produced by them upon the re-reference bore upon that issue. It will be recalled that there were three separate suits here, one by the three trainload shippers, one by a shipper in heavy volume, and one by the Florida Railroad Commission on behalf of the more or less casual shippers. Those suits had been ordered tried and heard together but were not consolidated until the time of the final decree and then that was done upon the motion of the railroad company (R. 382).

The Master took all of this testimony and lumped it together to determine a standard or uniform charge applicable alike to all shipments, according to weight and distance, saying (R. 197-198):

"One of the rules governing the Master in determining what charges should have been during the period of restitution, is that there should be no unjust discrimination against other shippers. It being the established rule of the Florida State Commission and the Interstate Commerce Commission—the two rate-making authorities having the right to make intrastate rates in Florida—that no difference in rates should exist for shipments of logs in single car loads and train loads, or in any movement less than train loads and above single car loads the Master feels it his duty to fix one charge applicable to all shipments, especially as all of these shipments were in the same territory. To estimate the charge for each shipment separately would involve, in some instances, the ascertainment of expense greater than in other instances because of delays not attributable to negligence of carrier, causing an increase of use of coal, extra compensation to trainmen and other expenses not ordinarily incurred, and because of number of cars hauled in many shipments varying in number.

"The record shows that the cost of transporting logs was less when made in trainload shipments than in single car shipments and less when the shipments were less than trainloads but substantially above single car loads and the Master feels it his duty to take into consideration these facts and determine, as best he can, what would be a proper charge applicable alike to all shipments, according to weight and distance."

When this came back to the District Court that Court recognized the differences in the services performed by the railroad saying (R. 352):

"In the present case it appears that trainload shipments of logs can be handled more cheaply than single carloads."

But that Court decided (R. 352):

"The master rightly concluded that a reasonable charge for carload shipments ought to be applied to

all, but to be fixed in view of the fact that much of the traffic did move in trainloads at a reduced cost and was great in volume and regular in recurrence."

We shall hereinafter have more to say with respect to the findings of the Master on the subject of these shipments which moved in large volume and with great regularity. We observe here that that Court stated that the Cummer Scale was prima facie the rate to be charged, that the findings and conclusions which were made and reached resulted from the grouping together of all shipments and the finding of a rate applicable to all alike, and that the findings are not that the Cummer Scale is improper as applied to the large shippers alone who are here suing in their own right. We shall now examine that evidence in some detail and the findings with respect to it, including the histories and effects upon the traffic of the scales of rates here involved, the rate comparisons and the cost studies, and shall demonstrate from it that as related to these trainload and large volume shipments the prima facie validity of the Cummer Scale was not thereby overcome.

## The History of the Cummer Scale of Rates

Prior to 1904 the Cummer Lumber Company constructed a lumber mill in the environs of Jacksonville, Florida, and built, as a plant facility, a railroad known as the Jacksonville & Southwestern Railroad, which ran in a southwesterly direction from Jacksonville to Newberry, Florida, a distance of approximately 90 miles. Likewise, prior to 1904, the Cummer Lumber Company and the Jacksonville & Southwestern Railroad entered into a contract (Former Record 258-260) for the transportation of the logs of the Cummer Lumber Company over that railroad at certain rates specified in the contract. In 1904 the Atlantic Coast Line Railroad purchased the Jacksonville & Southwestern Railroad and bought this contract along with the railroad,

and continued to apply the rates according to the contract (R. 555). On November 8, 1909, Mr. Walters, the Chairman of the Board of the Atlantic Coast Line Railroad, wrote to Mr. Cummer a letter in which he said: "I can assure you we have no more desire than you to make any change in the traffic agreements of June 29th, 1903, as we consider them quite as advantageous to us as they are to you, * * * " (Former Record 311-312).

In 1913 the Carpenter-O'Brien Company located a mill at Eastport, in the environs of Jacksonville, and in connection with the location of that mill in Jacksonville entered into an agreement, dated January 26, 1914, (Former Record, 261) with the Atlantic Coast Line Railroad for the transportation of about one billion feet of pine timber in LaFayette and Taylor Counties, Florida, to its mill on rates which were approximately in line with the scale provided in the contract between the Cummer Lumber Company and the Jacksonville & Southwestern Railroad Company. Observe, however, that the contract with the Cummer Lumber Company provided for a rate of $8.00 per car of 50,000 pounds, for distances between 60 and 90 miles and for each additional 10 miles over 90 miles an additional charge of $1.00 per car. The rate given to the Carpenter-O'Brien Company was $12.00 per car of 50,000 pounds, from points between Clara and Perry, Florida, to Cedar Creek (or Eastport) Florida, the distance from Perry, Florida, being 169 miles.

It will thus be noted that when the Atlantic Coast Line Railroad in 1914 made this contract, instead of conforming to the scale provided in the contract with the Cummer Lumber Company, which would have been $16.00 per car for 169 miles, it voluntarily gave to the Carpenter-O'Brien Company a lower rate of $12.00 per car. The Atlantic Coast Line Railroad filed the tariff with the Florida Railroad Commission as a trainload tariff, but that Commission required that it either withdraw the tariff or make it ap-

plicable to single carloads anywhere in Florida. The Atlantic Coast Line Railroad elected to accept this requirement and make the scale apply on any number of cars for the same distance anywhere in Florida (R. 556).

This action was not taken by the railroad either hastily or unadvisedly. After ten years of actual experience with the scale of rates, the rates given to the Carpenter-O'Brien Company on the long haul were lower than the rates originally provided in the Cummer Lumber Company contract, and the Atlantic Coast Line Railroad Company voluntarily published the scale of rates for general application. The railroad cannot be heard to say that in 1914 when it voluntarily published this scale of rates, it did not know more about this scale of rates and its effect than anyone else, and that it had not had ample time to investigate it and reach its own conclusions about it. Mr. Perrin, the freight traffic manager of the Atlantic Coast Line Railroad, says (R. 566) with reference to the making of this contract, that the Atlantic Coast Line Railroad thought it could make money under that contract and may have done so, and that the cost of transportation of logs had not increased more than the cost of transportation of other commodities since 1914.

The Carpenter-O'Brien Company was succeeded by the Brooks-Scanlon Corporation, and the contract taken over by the Brooks-Scanlon Corporation. In 1918 the published rates were increased 25%, and again in 1920 they were increased 25%, and in 1922 they were reduced 10%, along with the general increases and decrease in rates on all traffic at those times, so that after 1922 the Cummer Scale of rates was more than 40% higher than when published in 1914.

In 1923 the Brooks-Scanlon Corporation was contemplating the purchase of an additional half billion feet of timber, which it would have to transport under these rates if the timber was to get to its mill at Eastport. It went to the Atlantic Coast Line Railroad at that time and explained to

the officials of that railroad that it would not purchase this timber unless it could be transported under the contract, that is, under the Cummer Scale of rates. The Atlantic Coast Line Railroad agreed to this transportation under this contract and the Brooks-Scanlon Corporation purchased that timber and it was put under that contract (R. 870). Bear in mind that this was within three years of the time this controversy commenced and within six years of the time when the Brooks-Scanlon mill had to be dismantled on account of the increased rate at a loss of over three million dollars as we shall hereinafter relate.

Discussions were occasionally had between officials of the railroad and of the large lumber companies in Florida, and no dissatisfaction with the Cummer Scale of rates was ever expressed by the railroad officials (R. 825-826. The Florida Railroad Commission was always ready and willing to investigate the level of that scale of rates if the railroad or anyone else should complain about its level, but not one complaint was ever made to the Florida Railroad Commission about it in all the years since it was published in 1914. And indeed Mr. Perrin himself says (R. 1123) that the Atlantic Coast Line Railroad Company would have been still hauling in trainloads under the published tariff as long as this contract lasted if it had not been for this proceeding.

In the original proceeding before the Interstate Commerce Commission, begun in 1926, the Georgia Public Service Commission, far from condemning the Cummer Scale of rates, took the position of record that the end which it was seeking to achieve in that proceeding was the extension of the Cummer Scale of rates interstate into Georgia (Former Record 421). The Atlantic Coast Line Railroad in answering the complaint denied that there was or had been any violation whatever on its part of the Interstate Commerce Act and prayed "that it be hence dismissed" (Former Record 200). Moreover, the railroad expressly disclaimed any contention that the Cummer Scale of rates

was not compensatory, and stated as its position of record that it had not made and was not making any proposal to revise that scale of rates (Former Record 495-496).

The large Florida lumber companies have never taken any position other than that stated by Mr. Fleishel of the Putnam Lumber Company (R. 825) that in Florida under the Cummer Scale "the Atlantic Coast Line Railroad did not have any more profitable business than hauling logs in trainload lots." The longer this proceeding extends and the more extensive are the investigations into the records, the more firmly are we convinced of the soundness of this proposition.

A tremendous volume of log business was built up on the Atlantic Coast Line Railroad in Florida under the Cummer Scale as we shall hereinafter demonstrate—considerably more than half of the log business on that railroad. We shall hereinafter show that Brooks-Scanlon Corporation, Wilson Cypress Company, Cummer Cypress Company and Putnam Lumber Company alone in Florida in 1926, the year this controversy commenced, paid the Atlantic Coast Line Railroad the sum of $652,311.87 for transporting their logs in trainload quantities, whereas the entire revenue from the log traffic of the *entire system* of the Atlantic Coast Line Railroad, after the increase of rates, in 1929, was $794,334 and in 1930, $615,393.

## The History of the I. C. C. Scale

The I. C. C. scale (that is, the scale prescribed by the unlawful order of the Interstate Commerce Commission and paid by these cross-appellants upon the shipments of logs here involved) had its origin in the case of Pierpont Mfg. Co. v. Sou. Ry. Co., 50 I. C. C. 81, and in the case of Southern Veneer Assoc. v. A. C. L. R. R. Co., 62 I. C. C. 669 (Former Record, 21). The first of these decisions involved rates on logs from points in South Carolina south

of Columbia to Savannah, Georgia, and was decided May 2, 1918. The second involved rates on poplar and gum logs from points in South Carolina to destinations in North Carolina and was decided July 15, 1921. Since that comparatively recent beginning, the Interstate Commerce Commission has proceeded to permit this scale of rates *as maximum* rates in interstate commerce between the States but has never undertaken to prescribe it as a *minimum* scale of rates anywhere, that we ever heard of, except in Florida and except in this proceeding. With this beginning the Atlantic Coast Line Railroad has sought to establish this scale of rates uniformly upon its lines, that is, it has constantly maintained certain rates below the prescribed maximum rates in each State, but has sought to have the various State commissions of the States, except Florida, in which it operates, prescribe this scale as maximum rates which it may charge for intrastate commerce on logs. In Florida it has never made application to the Florida Railroad Commission but has chosen rather to rely upon the Interstate Commerce Commission. The first place in which this effort was a success was in Alabama where the Alabama Public Service Commission prescribed the scale on April 29, 1925 (Warren, Ex. 3-D). The State Corporation Commission of Virginia prescribed the scale for intrastate application on and after November 1, 1930 (Warren, Ex. 3). A scale somewhat lower was secured from the Railroad Commission of South Carolina, effective September 1, 1930. No effective action was ever secured from the North Carolina Corporation Commission or the Georgia Public Service Commission and none was asked from the Florida Railroad Commission.

The effect of this scale has been apparent. Although approximately one-half of the mileage of the Atlantic Coast Line Railroad lies within one hundred miles of the border of the States through which it operates and on direct lines running across the border lines of those States, only ap-

proximately one-eighth of the log business of that railroad in 1929 and 1930 moved in interstate commerce (R. 1214-1215). This alone demonstrates that the scale will not and never would move the traffic, if it demonstrates nothing else.

**The Effect of the Rates Prescribed by the Unlawful Order of the Interstate Commerce Commission Upon the Log Traffic in Florida of the Atlantic Coast Line Railroad.**

It must be borne in mind that prior to the effective date of the order of the Interstate Commerce Commission the Atlantic Coast Line Railroad had a larger business in Florida in the transportation of logs than it had on the entire balance of its system. Thus the Master found that in 1928 the log traffic of the entire system was 1,422,874 tons, of which the Florida log traffic constituted 814,777 tons (R. 203). This must be attributed to the large mills with their trainload operations, for we shall hereinafter demonstrate the enormous size of the traffic which they produced.

It should be noted that Mr. Perrin, for that railroad, has testified that the material factors in determining what constitutes a reasonable rate or charge are as follows (R. 1126):

> "What the traffic will bear, the volume of the traffic, the cost of the service, the value of the service to the shipper, the competition between carriers and of other means of transportation, a return on the property of the carrier, the absence of discrimination and the proper contribution to what is necessary to produce 5-3/4% return to the carrier."

We here show what the traffic would bear, and the value of the service to the shippers.

We have never known the volume of or revenue from the entire log traffic in Florida of the Atlantic Coast Line

Railroad in 1926, the year in which this proceeding was commenced, or in any particular year, but we do know that in that year four lumber companies alone in Florida paid to that railroad for transporting logs in trainloads under the Cummer Scale the following amounts :

| | | |
|---|---|---|
| Brooks-Scanlon Corporation.. | $334,048.47 | (R. 868) |
| Putnam Lumber Company... | 200,014.50 | (R. 1269) |
| Wilson Cypress Company.... | 71,742.75 | (R. 849) |
| Cummer Cypress Company.. | 46,506.15 | (R. 1274) |
| Total ..... | $652,311.87 | |

The Putnam Lumber Company operated two sawmills in the suburbs of Jacksonville, Florida, one of which it owned and the other belonged to the Cummer Lumber Company (R. 818-819). In 1926 it had about 1,200,000,000 feet of timber in Dixie and LaFayette Counties (south of Perry, Florida), which it was transporting over the Atlantic Coast Line Railroad to its mills (R. 819). It then had negotiations with the Denkmann Lumber Company for the sale of these mills and this timber at a purchase price of between ten and twelve million dollars. The purchaser proposed to continue the operation. The contract for the sale and everything relating to the transaction had been agreed upon when the purchaser heard of this proceeding, and fearing that the Cummer Scale would not continue in effect refused to complete the purchase (R. 819-820). The Putnam Lumber Company was paying $60,000 a year rent for the Cummer Lumber Company plant (at Milldale in Jacksonville) and its investment in the other plant (at Ortega in Jacksonville) was $250,000 (R. 821). It did not consider any rate substantially in excess of the Cummer Scale to be a reasonable rate for the transportation of logs in Florida for the operation of sawmills (R. 821). Mr. Fleishel, the President of that Company, testified that he figured from his knowledge of what it cost to move logs that the Alantic

Coast Line Railroad did not have any more profitable business than hauling logs in trainload lots under the Cummer Scale (R. 825). In 1927, the negotiations for the proposed sale having terminated for the reason above stated, this Company abandoned its operations in Jacksonville and built its mill in Dixie County in the timber (R. 818).

The Cummer Lumber Company had to junk its mill and thereby lost over one million dollars (R. 873). This disposes of the first trainload shipper.

The Brooks-Scanlon Corporation had its mill at Eastport (a suburb of Jacksonville) (R. 865). It had approximately one billion feet of timber in the neighborhood of [illegible]rbur and Perry, Florida (R. 867) and was transporting all of its logs over the Atlantic Coast Line Railroad (R. 866). The order of the Interstate Commerce Commission, effective in February, 1929, increased the log rate 120%, which Mr. Foley, the President of that Company said amounted to confiscating the property of that Company, and the Company could not stand it (R. 865). It was then operating approximately nine trains of logs every week (R. 866). Just as soon as possible after these rates went into effect in February, 1929, it dismantled the mill at Eastport and moved to Foley, Florida, in the timber (R. 865-866). *It would have kept its mill at Eastport and continued this transportation of its logs if the rate had not been increased* (R. 867, 870-871). *In making the move it took a loss of $3,244,000* (R. 866). This disposes of the second trainload shipper.

In addition to the mill of the Cummer Lumber Company at Milldale, Florida, upon which we have shown it took a loss of over one million dollars by reason of these proceedings, the Cummer Cypress Company owned a mill at Lacoochee, Florida (R. 873). Until 1928 this mill at Lacoochee was receiving logs over the Atlantic Coast Line Railroad Company in trainloads from Otter Creek. At that time it completed the cutting of the logs at Otter Creek (R.

873) and had girdled its cypress timber at Homosassa. In January, 1929, it made a service contract (Page 51 of Exhibits) with the Atlantic Coast Line Railroad for the transportation of these logs in trainload quantities from Homosassa to Lacoochee, Florida (R. 873). This was after the first decision of the District Court, which had limited the application of the order of the Interstate Commerce Commission to points north of Jacksonville, Gainesville, Burnett's Lake and High Springs. Homosassa and Lacoochee were south of all those points. After timber has been girdled it must be milled in not over a year (R. 873-874). This was the timber which the Cummer Cypress Company caused to be transported in trainload lots from Homosassa to Lacoochee and upon which its claim here is based. Just as soon as the transportation of this timber was completed the Cummer Cypress Company made a trackage arrangement with the Seaboard Air Line for the purpose of getting its other logs into the mill (R. 874). It could have moved this other timber over the Atlantic Coast Line but it could not afford to pay the high rate (R. 874). The present cost of transporting its logs under the trackage agreement with the Seaboard Air Line is less than the Cummer Scale (R. 874). This disposes of the third trainload shipper.

The mill of the Wilson Cypress Company is at Palatka, Florida, on the St. Johns River. In 1929 it owned about 300,000,000 feet of timber on the St. Johns River, and about 110,000,000 feet in the territory around Hines, Florida (R. 831). In 1931 when the mill shut down the timber in the territory of Hines, Florida, had been reduced to around 50,000,000 feet (R. 846). Under the new rate which the Interstate Commerce Commission has prescribed and which became effective February 25, 1933, it will not haul any logs and has built a small mill in the timber for the purpose of cutting those logs (R. 838-839). The mill in Palatka is maintained so that the logs on the St. Johns River can be rafted to the mill and there cut. Mr. MacPherson,

the President of that Company, definitely states that the traffic will not bear the rate prescribed by the unlawful order of the Interstate Commerce Commission, nor will it bear substantially more than the Cummer Scale (R. 839). So this high rate which the Interstate Commerce Commission has prescribed has driven the last of the trainload shippers to the woods and the trainload movement of logs in Florida, except under trackage agreements which we shall discuss later, is completed.

We have shown that the revenue from trainload movements alone to four companies was $652,311.87, in 1926. The Atlantic Coast Line Railroad has furnished a statement of its revenue on its shipments of logs in Florida from February 28, 1929, to January 31, 1931, substantially the period of two years here involved (Page 113 of Exhibits). Eliminating from that statement the trainload movements of the Wilson Cypress Company from Hines to Palatka, the trainload movements of the Cummer Cypress Company from Homosassa to Lacoochee and the few trainload movements which the Brooks-Scanlon Corporation had from Carbur and Perry to Eastport immediately after the high rate went into effect, all of which movements have been destroyed by the high rate, we find that the total remaining revenue of the Atlantic Coast Line Railroad for the transportation of logs in Florida during the two-year period at the high rate prescribed by the Interstate Commerce Commission was $186,231.78, or a total log business in Florida of less than $100,000 a year at the high rate.

In commenting upon the disastrous effect of this great increase in the previously existing log rates, the Master said (R. 217):

> "The charge made during the restitution period was more than twice that of the Cummer Scale and was partly, at least, the cause of the heavy decline in shipments during the restitution period and induced

no interstate shipments to Georgia, though the intrastate and interstate rates were made the same.

"Increase of a charge of long standing by more than doubling it for shipments of logs to destination, where shippers had constructed large mills, plants, and homes for employees, must have inflicted losses in investments and business and this fact should be considered in determining what charge should be made during the period of restitution."

To the same effect the District Court found (R. 353-354):

"The testimony as to the cost of hauling the logs satisfies us that the master's findings of a reasonable charge affords compensation to the carrier. It may be that trainloads might have been carried profitably at a less rate, but the traffic as a whole could not be carried for much less. Whether compensation should not be more liberal gives us the most concern. In view of the experience of the Interstate Commerce Commission and its full and repeated consideration of these very rates, we should have inclined to think the rates which they fixed, first for interstate traffic and then for intrastate traffic on logs, ought to be accepted as the fair charge. Against this, however, is the thought that they were not dealing with past transactions but attempting to fix a future rate to which carriers and shippers ought to conform themselves, and the fact is strong that the low rates were voluntarily established and maintained over a long period by the carrier, and on the faith of them these claimants had made investments and established businesses which would be and were very disastrously affected by a sudden and drastic raising of rates."

The authorities are clear that proof that a particular carrier established and maintained a particular charge for the carriage of a particular commodity for a substantial period of time is substantial evidence that the charge so established and maintained would be a reasonable charge

for a like commodity for a movement under like circumstances at a subsequent period:

L. & N. R. R. Co. v. Finn, 235 U. S. 601, 59 L. Ed. 379.

Service Lumber Co. v. Sumter Valley R. Co., 67 Ore. 63, 135 Pac. 539.

We have commented upon the disastrous effect of this high rate upon the shippers. It was equally disastrous to the railroad. Mr. Perrin here filed exhibits showing the tonnage of logs handled by the Class I railroads in southern territory in 1929 and 1930 (Ex. 76-B). We read into the record the tonnages which the same lines handled in 1928 (R. 1276). In 1930 the number of tons of logs handled by the Atlantic Coast Line Railroad on its entire system was 667,612 tons, including the trainload movements of Wilson Cypress Company, which have since ceased. In 1928 (before this high rate) the Atlantic Coast Line handled for Brooks-Scanlon Corporation alone 463,724 tons of logs, or more than two-thirds as many logs as that railroad handled on its entire system in 1930. And this Brooks-Scanlon movement was a long haul—169 miles. This feature is illustrated by the fact that in May, 1926, the average haul on all logs on the Atlantic Coast Line Railroad was 109 miles (Former Record, 287), whereas during the restitution period the average haul on the logs in Florida, other than the trainloads, was 49.8 miles (R. 928).

The Atlantic Coast Line attempted to blame some of this tremendous falling off in volume to the depression, but we call the attention of the Court in the records to which we have just referred to the tonnages of logs handled on their entire systems in 1928, 1929 and 1930 by the Atlantic Coast Line and the Seaboard Air Line, its principal competitor in this territory, particularly in Florida. These records show that those two railroads, respectively,

handled the following numbers of tons of logs on their entire lines in the following years:

| | *1928* | *1929* | *1930* |
|---|---|---|---|
| A. C. L. | 1,422,874 | 949,840 | 667,612 |
| S. A. L. | 414,939 | 526,862 | 522,449 |

Omitting the trainload shipments of Brooks-Scanlon Corporation, Wilson Cypress Company and Cummer Cypress Company, who had all ceased to ship and none of whom will ship logs at the high rate, the comparison of the log tonnage of the two railroads in 1929 and 1930 would be as follows:

| | *1929* | *1930* |
|---|---|---|
| A. C. L. | 815,080 | 506,508 |
| S. A. L. | 526,862 | 522,449 |

The Seaboard log rate in Florida was lower than the scale prescribed by the unlawful order of the Interstate Commerce Commission, as we shall hereinafter show.

Where the Atlantic Coast Line tonnage dropped off more than 50% from 1928 to 1930, and if we omit the trainload shipments of Wilson Cypress Company in 1930, more than 64% from 1928 to 1930, the Seaboard Air Line tonnage increased more than 25% in the same years.

The Master found (R. 204):

> "There is no doubt but the decline in log traffic after the Cummer scale was increased was substantial and much of the decline was due to the increase of rates. A very small part of it was perhaps due to the depression. The depression did not likely affect the shipment of logs until some time about the latter part of 1930 near the end of the period."

This short summary shows that the history of the Florida Lumber industry and past experience demonstrates that under the Cummer scale a large volume of traffic moves, that the traffic will bear that scale of rates and that the

service is worth that scale of rates to the shipper. It further demonstrates: that the high scale of rates prescribed by the unlawful order of the Interstate Commerce Commission will not move the traffic in any volume at all even when the volume of traffic has been already established under a lower scale, but on the contrary will effectually destroy the traffic; that the traffic will not bear this high scale of rates; and that the service is so far from being worth that high scale of rates to the shippers that they will lose and have lost millions of dollars rather than pay it.

## The Comparison of Rates on Trainloads.

The District Court observed that trainload shipments of logs could be handled more cheaply than single carloads, but it likewise stated that the Florida Commission had refused to permit the Cummer scale to be filed as a trainload rate, and that the Interstate Commerce Commission did not establish any trainload rates, and that it was considered to be "impolitic" to make such rates (R. 352).

However, it is well recognized that volume of traffic is a material factor in ratemaking. It was testified with respect to point-to-point rates that volume of traffic usually resulted in a lower rate (R. 1214). It also appeared that when a shipper appeals to a carrier for a rate adjustment the first question is generally as to the volume of the movement involved (R. 1214).

The volume of the log traffic in Florida is much more dense than elsewhere (R. 756). The railroad's own rate expert, Mr. Perrin, testified that it cost less to handle a given amount of logs in a trainload than in single cars (R. 576), and that this was true even though the return movement of the cars in the trainload was 100% empty and the empty return movement of the single cars was a lesser percentage (R. 576-577). Mr. Lamb, the railroad's General Auditor, testified to the same effect (R. 606).

Even the Interstates Commerce Commission found (See pages 196-197 of Exhibits):

> "The costs in connection with the trainload movement from Hines to Palatka are undoubtedly less than they are in connection with movements in single carload lots.
>
> • • •
>
> "That movement, it must be remembered, was a regular one in trainload lots of 40 to 45 cars, and the cost of handling such solid trainloads direct between two given points without any intermediate train break-up in classification yards and without any switching en route, is undoubtedly less than in single carload movements which are handled in ordinary pick-up service."

We have pointed out that both the Master and the District Court found that it cost less to handle the logs in trainloads. There is no dispute upon this point

We shall later take occasion to advert to the subject of the cost of the particular trainload movements. We here point out this difference only in connection with the statement that whatever trainload rates have been put in evidence here are far lower than the single car rates and that they were properly made lower for this obvious reason.

We shall discuss in order the trainload rates which were put in evidence. The first is a rate of the Mississippi Central Railroad shown on Exhibit 7-A (R. 761-762), applicable on shipments of five cars or more moving in one day in one train, from ten points of origin to Bude, Miss., and from one point of origin to Hattiesburg. These rates were in effect throughout the restitution period and are still in effect. The rates are expressed in dollars per car regardless of weight, and the shipper could put on as much weight as the car could carry without extra cost. At the average weight of the loads to the car in the Wilson Cypress Company movement from Hines to Palatka those rates are a trifle higher than the Cummer scale, but if the cars were

loaded a little heavier (70,000 to 80,000 lbs.) those rates are lower than the Cummer Scale (Exhibit 7A and R. 761-763).

We likewise showed (R. 765-766) a rate applicable on pine logs, in trainloads of ten or more cars, for distance not exceeding fifteen miles between all points on the Nacogdoches & Southeastern Railway (in Texas) of $3.15 per car. This rate was in effect throughout the restitution period and is applicable regardless of weight. The rate under the Cummer scale for the minimum car of 50,000 pounds for the same distance is $8.55 or more than twice as high as the Texas trainload rate.

There was also a rate of the Seaboard Air Line Railway applicable on logs, per car of 4,500 feet, from points between Bethune and Fulton, S. C., to Cheraw, S. C., the distance ranging from 7 to 35 miles, of $6.30 per car when shipments were made in lots of not less than five cars (R. 796-797). Assuming twelve pounds of weight to the foot, 4,500 feet of logs would weigh 54,000 pounds and the Cummer scale rate on such a car for the same distances would be $9.23, or about fifty per cent. higher than the Seaboard rate. It should be noted that this tariff published at the same time a rate on single cars of the same weight between the same points which was a trifle more than twice as high as the trainload rate (R. 797). These trainload rates and single car rates were cancelled on January 3, 1928, when they were omitted from the Log Tariff of the Seaboard Air Line then published (R. 797).

We now come to some trainload rates which the Atlantic Coast Line Railroad made by private agreement and applied over its lines for many years, although that railroad now insists that rates applicable to trainload shipments are improper. Those contracts are strikingly similar to the contracts which the Atlantic Coast Line Railroad had during the restitution period with the Wilson Cypress Company, the Cummer Cypress Company and the Brooks-Scan-

lon Corporation. There are much the same provisions with respect to the movement of the trains and for the shipment of the outbound lumber over that railroad. The only material difference is that the contracts with these claimants contemplated the movement of more volume of logs and the contracts we shall now consider provided a specific agreed rate for the movement.

The first of these contracts is Exhibit 52-A, (R. 879) dated October 31, 1913, between Dill-Cramer-Truitt Corporation and Atlantic Coast Line Railroad Company. It provides for the operation of two trains a week of between 35 and 40 cars per train, from points at or near Dixon and Verona, North Carolina, to Suffolk, Virginia. The distance from Dixon to Suffolk is 258 miles, and the distance from Verona to Suffolk is 263.5 miles. The rate provided was $4.75 per thousand feet, with a required carload minimum of 4,000 feet. The log train service under this contract was discontinued in 1918 (R. 1128). Mr. Perrin had testified in another proceeding relating to shipments of logs from North Carolina to Virginia that the railroad's experience from actual weighing of logs showed that they weighed from 14 to 18 pounds to the foot (R. 1141). If these logs only averaged 14 pounds to the foot, the rate under this contract was 3.4 cents per hundred pounds for a haul of 260 miles, whereas the Cummer scale rate for the haul from Hines to Palatka was 3.2 cents per hundred pounds for a haul of 119 miles, or less than half the distance of the haul under this contract.

The next trainload rate is shown in Exhibit 55-A, (R. 880-881), being a contract dated December 15, 1916, between Eureka Lumber Company and Atlantic Coast Line Railroad Company. It provided for two trains of 30 cars each per week between Wharton, North Carolina and Washington, North Carolina, a distance of 5.1 miles. The rate provided in the contract was $1.50 per thousand feet or 1.07 cents per hundred pounds, on this same basis of 14 pounds

to the foot. The Cummer scale rate for the same distance is 1.71 cents per hundred pounds. Mr. Perrin testified that this contract has never been formally cancelled but that operations under it were discontinued some time in 1928 (R. 1128).

The next trainload rate (Exhibit 56-A, R. 881), is a contract dated July 1, 1908, between Jackson Brothers Company and Atlantic Coast Line Railroad for shipments from certain points near Parkton, North Carolina, to Whaleyville, Virginia, the shortest distance being 201 miles and other points from which shipments are to be made being slightly more distant. It provides for the shipment of between 600,000 and 750,000 feet per week in cars of minimum load of 5,000 feet. The rate provided is $3.80 per thousand feet, or on the basis of 14 pounds to the foot, 2.71 cents per hundred pounds. Note that this haul of over 200 miles carried a rate which is considerably less than the Cummer scale rate of 3.2 cents per hundred pounds for the 119 miles from Hines to Palatka. The same Exhibit shows a supplement to this agreement, dated January 17, 1917, which continued the rate and the contract in effect, and a further supplement, dated July 1, 1920, which terminated the contract.

We realize that there are not many such rates in existence, but we can say that by comparison with every such rate shown in the record, the Cummer scale is the highest trainload rate that we have heard of or know anything about.

**The Commitment to Re-Ship the Manufactured Product.**

The Master commented upon the fact that rates are sometimes reduced because the carrier gets the outbound shipment of the manufactured product (R. 201). In explanation of that he said (R. 201-202):

> "There are many commodities that are not processed but consumed at destination and when there is to be a

reshipment in different form carriers should be, and are, willing to ship the original product at a very reasonable rate, if they can get the reshipment."

* * *

"Many transit rates were shown to be much lower than the local rates and there is testimony in the record that some of the carriers transport logs practically at cost and without any profit in order to get the shipment of the outbound product."

He thus differentiates logs from cement, lime, brick, sand and the other commodities the rates on which were shown by the railroad, if there was no outbound shipment of the manufactured product (R. 202).

We have commented upon the fact that the contracts between the trainload shippers and the railroad required the re-shipment of the outbound manufactured product and that the lumber was re-shipped and for long distances. Note also, that a bond was given for the faithful performance by the lumber companies of all of their obligations and agreements contained in those contracts (Former Record 335 and page 55 of Exhibits). Those contracts were in effect during the period of restitution and the shipments upon which claim is here made were made under them.

The case of Hoover v. Penn. R. Co. 156 Pa. 220, 22 L. R. A. 263, is illustrative of the point here made with respect to the obligation to ship the outbound products. There the rate charged on coal to an iron and nail company was 30c a ton in quantities of 20 or more tons per day. The rate charged to coal dealers was 50c a ton for the haul, but the Railroad company received from the nail company outbound movement of manufactured products each day amounting to approximately two cars. The court held that the difference in the charge was justified, and in so doing it said in part:

"The business of the plaintiffs paid but one freight to the defendant, while the business of the nail company paid not only that freight, towit, for hauling the coal

to the nail works, but also in addition to that another and entirely independent freight to the defendant on all of the products manufactured by the nail company. This was a most important and vital difference in the conditions and circumstances of the two shipments. The authorities are very clear and strong that where an additional freight is obtained by means of the lower charge the discrimination is justified both at common law and under the statutes."

In the case of the trainload shippers the contracts, with bonds to secure them, provide an additional reason why the railroad could under no circumstances assert that the Cummer Scale was unreasonable or unjust.

**The Cost Figures on the Trainload Movements.**

The cost estimates produced by the defendant were offered in its behalf by Mr. Lamb, its General Auditor. Referring to these figures of Mr. Lamb the Master found (R. 211-212):

"In the computation of Mr. Lamb on the Hines to Palatka movement, during the month of November, 1930, he found the total handling expenses of this movement from Hines to Palatka at $18.32 per car, and when to this amount was added $2.82 per car for Florida taxes, and $6.04 as representing a proportionate share of interest on investment at 5 3/4% the total would be $27.18 per car. The rate of 6.5c per 100 pounds, paid during the restitution period applied to average weight of 64,000 pounds per car for the distance of 119 miles, results in a revenue of $41.60 per car. If the rate under the Cummer Scale of 3.2c was applied, it would yield a revenue of $20.48 per car. The I. C. C. in its reports several times said that the cost in connection with the trainload movement from Hines to Palatka is lower than that in movements in single car loads."

*Thus the Master found, and his findings were confirmed by the Court, that the cost per car of this movement as com-*

*puted by our adversary, the railroad, was $27.18, including return on investment or profit of $6.04 per car.* As was pointed out, the amount paid was $41.60 per car and the Cummer Scale rate was $20.48 per car.

In its report of July 5th, 1932, in the re-opened proceedings (186 I. C. C. 182, page 196 of Exhibits), the Interstate Commerce Commission said with respect to this same trainload movement:

> "• • • then the total haulage expenses on this movement were $18.51 per car. When 6 cents per car for Federal income taxes, and $2.85 per car for Florida taxes are added, the haulage cost plus taxes is $21.42, and if $6.10 as representing a proportionate share of interest on investment at 5.75 per cent is added to the latter figure, the haulage cost plus taxes and return becomes $27.52 per car.
>
> "During the month in question the rates prescribed by the former order were in effect. The rate prescribed for the distance from Hines to Palatka, 119 miles, was 6.5 cents. This rate applied to the average weight of the Hines-Palatka shipments, 64,000 pounds, resulted in a revenue of $41.60 per car. The rate under the Cummer Scale for 119 miles is 3.2 cents, yielding a revenue under the weight of 64,000 pounds of logs of $20.48 per car."

That Commission stated, as the Master pointed out (R. 212, 218), that the costs in connection with the trainload movement were less than in connection with single car movements, and therefore too low for use as the measure of future rates to be fixed on the basis of and applicable to single car movements.

The Interstate Commerce Commission found that the cost of this Hines to Palatka movement was $27.52 per car, including taxes of $2.85 per car and profit of $6.10 per car (R. 218).

Because the Master felt that he must fix a uniform charge applicable to all shipments he fixed what he called a proper

charge per car for this traffic of $34.42 per car, although these estimates, the one of $27.18 by the railroad and the one of $27.52 by the Commision were the estimates presented by the defendant carrier. The estimates made by our witnesses, were, of course, much lower and were below the Cummer Scale, which the Court found prima facie to be the applicable rate.

Mr. Saunders, on behalf of these claimants, made two estimates upon different bases of the costs of this trainload movement. With respect to these the Master found (R. 219):

> "In the record there are calculations of others which estimate the total haulage cost to be less than the estimates made by Mr. Lamb and the I. C. C., above referred to. Some were much less. If they were treated as correct, the return on investment from the revenue received would be shown to be very high. For instance, Mr. Saunders, a witness for claimants, in his computation of the Hines to Palatka movement, after eliminating charges for transporting company coal, found the cost per car $14.11, and after eliminating other out-of-pocket expenses, which he said should be eliminated, found the cost per car $12.11. After adding to the former $2.52 for taxes, and $4.65 for 5¾ on investment, his figure was $31.28,* and after adding to the latter $2.11 for taxes and $3.99 for interest on investment, his figure was $18.21. The revenue per car was $41.60."

Thus our witness estimated costs per car of $21.38 and $18.31, including taxes and profit, for this trainload movement, where the amount paid was $41.60 per car and the Cummer Scale would have produced $20.48 per car.

Again we call attention to the fact that all of these computations included return on investment or profit at 5 3/4%,

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*The figure $31.28 is incorrect, as the addition shows. It should be $21.28.

whereas the railroad was not at the time in question earning any such return or profit. The rate of return, or profit, on *all traffic* hauled on the Atlantic Coast Line system in 1929 was 4.20%, and in 1930 it was 2.37%, and in 1931 it was 1.57% (R. 219). The rate of return, or profit on *all traffic* handled by that railroad *in Florida* in 1929 was 2.43%; in 1930 it was 1.17% and in 1931 it was .82%. If this profit which has been included in the above figures were eliminated, or only equalized with the profit which was then being earned on other traffic, none of the final costs so computed would exceed the Cummer Scale except by a trifling amount.

## The Trackage Agreements and Rental Contracts and the Costs Demonstrated by Them.

It was shown that the Atlantic Coast Line Railroad Company, the Louisville & Nashville Railroad, the Seaboard Air Line Railway, the Florida East Coast Railway, the Live Oak, Perry & Gulf Railroad, and the South Georgia Railway, before, during and since the restitution period had in effect agreements with various lumber companies by which the lumber companies were permitted to operate their own log trains over designated portions of the tracks of those railroads in hauling logs from the woods to the mill (Exhibits 29A, 68A, 61A, 53A, 54A, 57A, 58A, 59A, 60A, 65A, 94A, 98A, 99A, 99A-1, 90A, 91A, 92A, and 51A). The average amount paid for this trackage right is about six cents per car per mile for the loaded movement, no charge being made for the empty return movement. In some cases it runs a little higher and in many cases less. These trackage agreements were all applicable in Florida except certain of those of the Atlantic Coast Line Railroad. However that railroad had three of those agreements in effect during the entire restitution period which were ap-

plicable in Florida in the very territory where the Wilson Cypress Company's logs originated (Exhibits 29A and 68A and 61A, page 29 of Exhibits, and R. 883 and 887-892).

The Cummer Cypress Company, after it discontinued the use of the Atlantic Coast Line Railroad, effected a trackage agreement during the restitution period with the Seaboard Air Line Railway, by which the Cypress Company runs over 19.16 miles of the Seaboard tracks, and its costs under that operation are less than the Cummer Scale (R. 874).

In the last part of January, 1929, just before the high rate became effective, the Wilson Cypress Company could have made such a trackage contract at six cents per car per mile with the Live Oak, Perry & Gulf Railroad, the Seaboard Air Line Railway and the Southern Railroad for the use of their tracks in getting the lumber company's log trains from the woods near Hines to the mill at Palatka (R. 831-833, 1272-1273). The arrangement was not made because the trains would have to go by a longer route through three inspection points, because a part of the tracks of the Live Oak, Perry & Gulf Railroad was not in good condition and because the litigation was pending on appeal for the purpose of setting aside the high rate (R. 833, 1273), but it could have been made.

The Atlantic Coast Line Railroad produced, on our demand, Exhibit 63-A (Pages 65-68 of Exhibits), which is a reciprocal agreement between substantially all of the larger railroads in the South, including the Atlantic Coast Line Railroad, as to the rate chargeable for trackage and the rent of locomotives and other related matters. That contract provides a trackage charge of $1.50 per train mile (regardless of the size of the train), minimum charge $10.00 and in addition, rent of locomotives and cost of wages and supplies, plus 10% of wages and plus 15% of supplies, fuel to be included at actual cost, plus freight charges to point issued, plus handling costs. It likewise provides for a

rental rate on locomotives of one mill per pound of tractive effort per day (minimum, $15.00 per day).

We feel that a most exact method of determining the cost of handling the trainload movements is to break that cost up into three elements: (a) The trackage charge which includes all superintendence, management and indirect charges, overhead, and return on investment in connection with the use of the tracks; (b) the out-of-pocket expenses, including repairs to the equipment used and all direct expenses of operation; and (c) the fair rental value of the rolling equipment used.

Mr. Saunders made such a calculation of the cost of the trainload movement of the Wilson Cypress Company in November, 1930, upon this basis in his Exhibt 72-A (Page 78 of Exhibits), and determined upon a total cost of $17.82 per car, leaving a surplus under the Cummer Scale of nearly three dollars per car.

The rental of the cars in the calculation is the rental rate fixed by agreement (Exhibit 64-A, Pages 69-71 of Exhibits) between the Atlantic Coast Line Railroad and Brooks-Scanlon Corporation, for the rental of the log cars used in the trainload movement of Brooks-Scanlon Corporation to Eastport, Florida, upon which its claim here is based.

Thus, taking into consideration all of these elements, there was a surplus under the Cummer Scale of nearly three dollars per car on the Wilson Cypress Company movement to Palatka. We use the word "surplus" because there are profits already included in the component elements of Mr. Saunders' computations. The trackage rental of six cents per car per mile undoubtedly includes profit, because the fact that railroads will and do make the trackage contracts demonstrates that in their judgment they are securing a profit by so doing. The same thing is true of the rental of the equipment.

Mr. Saunders made another similar computation, using precisely the same methods and basis for the purpose of

determining the cost of the trainload movement of the Cummer Cypress Company from Homosassa to Lacoochee in May, 1929 (Exhibit 78-A, Page 85 of Exhibits). This showed the cost to be $12.30 per car, leaving a "surplus" under the Cummer Scale of more than $1.00 per car.

Mr. Saunders in similar manner prepared an analysis of the cost of the Hines to Palatka movement in November, 1930 (Exhibit 73-A, Page 79 of Exhibits) based wherever applicable upon the reciprocal rental agreement (Exhibit 63-A) above referred to, determining thus a total cost per car of $20.39, being almost exactly the amount receivable per car under the Cummer Scale. Every component part of this exhibit, except certain small items amounting to less than $500.00, includes a profit (R. 909).

Therefore, taking together all of the proper charges, upon the going, or market, basis at the time involved, including all elements of profit, we find that the Cummer Scale, as applied to the trainload movements, paid its way. This conclusion is confirmed by the investigation and experience of the lumber companies operating under these trackage contracts as we shall now demonstrate.

**The Costs, Reasonably Contemplated and Actually Experienced, by the Lumber Companies in Operating Their Own Log Trains in Florida During the Period Involved.**

The Wilson Cypress Company at the beginning of this restitution period when it was contemplating the making of, and could have made, the trackage agreements with the three railroads, figured out the costs of operating its own log trains. These figures are set out at pages 833-835 of the record and at pages 852-854 of the record. They are computed in cents per thousand feet, based upon the hundred million feet of timber which then remained to be logged and transported to Palatka (R. 852).

The final total cost so arrived at was $4.10½ per thousand feet (R. 834, 854). The cost under the Cummer Scale was $3.52 per thousand feet on the Atlantic Coast Line (R. 835). This is 58½ cents less than the cost per thousand feet, which the Wilson Cypress Company anticipated, but it must be remembered that 40 cents per thousand feet of the cost anticipated by the Wilson Cypress Company was incurred in the woods before the logs reached the common carrier connection (R. 852-853), and the Cummer Scale only carried the logs from the common carrier connection at Hines to Palatka, so that in making any comparison of costs, the costs incurred in the woods should be eliminated. Thus the proper comparison is $3.70½ per thousand feet against the Cummer Scale cost of $3.52 per thousand feet.

Again it should be observed that the Wilson Cypress Company was obliged to figure these costs upon the basis of the number of feet of logs remaining to be hauled. If there had been more logs to be hauled all of these costs, except the out-of-pocket costs of operating the trains and the trackage charge, would have been decreased, because the total of these other costs would have been divided by a greater number of feet of logs. Of course the common carrier expects to remain in business and is not obliged to figure its costs upon any such basis. This should be borne in mind in connection with all of the cost figures of the lumber companies for hauling their own logs, because they all figure on this basis of cost per thousand feet.

It should be pointed out that these were not figures made for the purpose of this case, but were made in 1929 by a company then engaged in the prudent and careful management of its business.

Mr. Cummer, on behalf of the Cummer Cypress Company, testified that his costs of getting logs (under the trackage agreement with the Seaboard Air Line) was less than the Cummer Scale (R. 874).

Mr. Scherer of the Brooks-Scanlon Corporation showed that that company in 1929 and 1930 delivered logs to the Burton-Schwartz Cypress Company at Perry, Florida, *over the Atlantic Coast Line tracks* under the trackage agreement between the Burton-Swartz Cypress Company and the Atlantic Coast Line Railroad (R. 859). A statement of the costs of that operation (Claimant's Exhibit 49-A, page 63 of Exhibits) showed the cost to be approximately *eighty-five cents per thousand feet.* (R. 861). The distance from Carbur to Perry is 17.58 miles, and the rate for that movement under the Cummer Scale (figuring 12 pounds to the foot of logs) would be $2.05 per thousand feet, or more than twice the cost so developed by the Brooks-Scanlon Corporation.

A similar computation of costs during the year 1930 of operating Brooks-Scanlon Corporation log trains between Scanlon and Foley, Florida, under the trackage agreement between the Brooks-Scanlon Corporation and the Live Oak, Perry & Gulf Railroad, to which we have referred (Exhibit 50-A, page 64 of Exhibits), showed a cost of approximately *$1.26 per thousand feet.* (R. 863). The Cummer Scale charge for the movement would have been *$2.05 per thousand feet.*

The Burton-Swartz Cypress Company presented a similar computation of the cost of the operation of the log trains of that company between Carbur and Perry, Florida, from September 24, 1928, to January 29, 1930 (Exhibit 30-A, page 35 of Exhibits), under the trackage contract between that company and the Atlantic Coast Line Railroad Company, showing a cost of *$1.60 per thousand feet* hauled. Here again the Cummer Scale on a basis of 12 pounds to the foot of logs would amount to *$2.05 per thousand feet.* All these costs were incurred by these companies during the restitution period here involved, and in the very territory where the claims for restitution here presented arose.

Undoubtedly wherever anything demonstrating the actual cost of handling logs in Florida in trainloads over the Atlantic Coast Line Railroad can be produced, the costs so produced conclusively demonstrate that under the Cummer Scale these trainload movements were a very profitable business.

**The Evidence in the Former Record with Respect to Costs of the Trainload Movements.**

In the record before the Interstate Commerce Commission upon which its unlawful order was based it appears that Mr. Perrin stated that the average revenue per car under the Cummer Scale of the trainload shipments to the Brooks-Scanlon Corporation at Eastport and the Putnam Lumber Company at Milldale was $20.47 (Former Record, 522). He then stated that in order "to remove any incorrect impression that may exist that there is a very large amount of profit in the operation of these log trains" he had asked Mr. White, the Superintendent of Transportation of the Atlantic Coast Line Railroad, to make a cost study with respect to the operation of the Brooks-Scanlon log trains and that Mr. White would present that cost study (Former Record, 522).

Mr. White then presented that cost study, which will be found at pages 294-307 of the former record. His explanation of that cost study will be found at pages 522 to 532, inclusive, and pages 560 to 562, inclusive, and pages 709 to 715, inclusive, of that record. His cost study covers the operation of the log trains of the Brooks-Scanlon Corporation from Perry and Carbur to Eastport for the month of September, 1926. That cost study shows a cost per car of $19.13, which Mr. White compared with the revenue under the Cummer Scale of $20.47. He said that he had taken into account no return on the value of the railroad which was used in performing the service. But the cost

study showed a profit of $1.34 per car, which could be applied against this return on investment.

Mr. Pettijohn, on behalf of the Florida Railroad Commission, revised and criticized Mr. White's cost studies and determined a total cost of $14.20 per car for the trainload movement of the Brooks-Scanlon Corporation in September, 1926. Assuming Mr. Pettijohn to have been correct, there was a profit over all costs of $6.27 per car on this trainload movement. Mr. Pettijohn's exhibits setting forth the details of his cost study will be found at pages 369 to 377 of the former record, and his testimony explaining his mehod of determining this cost at pages 629 to 641, and 644 to 656 of that record.

With respect to these two cost studies the Interstate Commerce Commission said (Former Record 23) in its report of August 2, 1928 (upon which the unlawful order was entered):

> "Both cost studies are based on certain arbitrary assumptions *and both are based on movements in trainloads from two points of origin to one destination. Neither can be accepted to show the approximate actual cost of transporting logs in single carloads intrastate throughout Florida.*" (Italics supplied.)

It is apparent that the criticism which the Interstate Commerce Commission made of these cost studies was that they developed the cost of trainload movements alone and had no proper relation to the cost of handling single car movements. But for the purpose of this investigation and the determination of the amount of restitution to be awarded to the trainload shippers, Wilson Cypress Company, Cummer Cypress Company and Brooks-Scanlon Corporation, we consider them very material.

The position of the Florida Railroad Commission (Former Record, 627-629) was that after investigation it believed that the traffic as then handled under the Cummer

Scale, consisting for the most part of trainload movements, was remunerative.

**The Further Evidence that the Trainload Log Movements of the Wilson Cypress Company, the Cummer Cypress Company and the Brooks-Scanlon Corporation, would Produce a Substantial Profit at the Cummer Scale of Rates,**

The trainload movement of the Wilson Cypress Company between Hines and Palatka for the month of November, 1930 (said to be a typical month) showed an out-of-pocket cost of $4.81 per car (Lamb, Exhibit 23,, pages 125-126 of Exhibits). The trainload movement of the Cummer Cypress Company between Homosassa, Florida, and Lacoochee, Florida, for the month of May, 1929 (said to be a typical month) showed an out-of-pocket cost of $4.25 per car (Exhibit 77-A, pages 83-84 of Exhibits). The amount of revenue under the Cummer Scale per car would have been, in the case of the Wilson Cypress Company, $20.48, and in the case of the Cummer Cypress Company, $13.34.

These out-of-pocket expenses which we are discussing constitute the amounts which the Atlantic Coast Line Railroad Company would not have expended if it had not run the log trains. It does not include any proportional part of the cost of overhead or maintaining the tracks or indirect costs, but merely the direct cost of operating those trains. But it must be remembered that these indirect costs go on anyhow, and it is only by volume of traffic that these costs are met. Thus it seems absurd to say that the railroad company was losing money by expending $4.81 per car and receiving $20.48 per car under the Cummer Scale in the case of Wilson Cypress Company and expending $4.25 per car and receiving back $13.34 per car under the Cummer Scale in the case of the Cummer Cypress Company. It would take a great many statistics to convince the ordin-

ary business man that he was losing money operating on any such basis.

It is *volume* of traffic that meets the cost of these overhead indirect expenses. Mr. Willoughby, a witness for the railroad, himself said, as the Master pointed out, "The added ton that is put on a railroad is profit. It is like the added guest that comes to a hotel and occupies a room which would otherwise be empty." (R. 1017).

Mr. Lamb, after all his testimony about costs in this case, was shown to have testified in September, 1932, in a proceeding before the Interstate Commerce Commission involving rates on Florida fruits and vegetables that notwithstanding that the revenue of the Atlantic Coast Line from its passenger business exceeded by only a small amount the out-of-pocket costs, yet if there was any surplus over and above that out-of-pocket cost then the passenger business was not a burden upon the freight business (R. 1086). When it was pointed out to him that the out-of-pocket expenses of the Wilson Cypress Company were only about 20% of the revenue under the Cummer Scale and he was asked if that movement was a burden on the other traffic, he finally said: "I don't believe that as to that particular question I should attempt to answer it. It has been indicated by counsel that it is a question of law." (R. 1087-1088).

In 1926, when the trainload shipments of four lumber companies alone in Florida were over $650,000, the out-of-pocket expense based upon the figures in this record would amount to little more than a fifth of the revenue under the Cummer Scale, *which meant that there was from that trainload traffic approximately one-half million dollars a year to apply against these overhead and indirect costs which go on anyhow with little regard to the volume of the traffic.* We think that that same volume of traffic producing those results would be very welcome today to any railroad which was alive to its own interests.

## The Evidence with Respect to the Single Carload Shipments.

The evidence with respect to single carload shipments confirms the conclusion we have hereinabove reached with respect to the large shippers. We shall review that evidence as briefly as possible. We shall deal first with the rate comparisons.

### (a) The Rates for Single Carload Shipments of the Atlantic Coast Line Railroad and the Log Rates for Single Carload Shipments on Other Florida Railroads.

The scale of rates prescribed by the unlawful order of the Interstate Commerce Commission was in effect on the Atlantic Coast Line Railroad on its interstate traffic on which, as we have above set forth, only about one-eighth of its log traffic moved. It was also in effect during this restitution period in Virginia and Alabama where that railroad had only a small portion of its lines. In intrastate commerce in North Carolina, South Carolina, and in Georgia it had other and lower rates, averaging about half-way in between the Cummer Scale and the scale prescribed by the Commission. Likewise, the rates on logs less than six feet in length in Florida (called the "short log rate") was about half-way between the two. At page A of the Appendix hereof we have tabulated the rates in effect on that railroad during the restitution period, showing this comparison.

In that tabulation we have also shown 60% and 65% of the Florida intrastate rate on lumber. It was pointed out that the Interstate Commerce Commission has frequently fixed 65% of the lumber rate as a proper rate for logs (R. 531). Mr. Perrin testified (Former Record, 482), "the log rates heretofore prescribed by the state commissions in Florida and Georgia have been 60% of the rates prescribed on lumber."

The Atlantic Coast Line Railroad likewise had in effect during all this period log rates (pages 14-16 of Exhibits) between certain points in North Carolina and Virginia which were lower than the rates generally applicable. They were and are point-to-point rates applicable from 85 points of origin to 13 destinations. It will be observed that they were and are on substantially the same level as the Cummer Scale and apply only between particular stations.

There was another scale of rates on the Atlantic Coast Line Railroad applicable to logs in Florida from 231 points of origin to 21 points of destination, to which we call the attention of the Court. This is shown by Claimants' Exhibit 27A and an analysis of it is set out in Claimants' Exhibit 28A (pages 25-26 of Exhibits). The rates so published were generally only a little higher than the Cummer Scale and in a few instances were lower than the Cummer Scale (page 26 of Exhibits). These rates were established more than 20 years ago and were first gathered together in a tariff in 1912 (R. 1149). In 1926 and only a few days before the proceeding at bar commenced before the Interstate Commerce Commission these point-to-point rates were cancelled by the railroad.

Let us now consider for a moment the rates applicable during the period involved on the Seaboard Air Line Railroad, the principal rail competitor of the Atlantic Coast Line Railroad in Florida. The "short log rate," to which we have above referred, was applicable in Florida on that railroad throughout this time. The rates on long logs of the Seaboard Air Line as fixed by order of the Florida Railroad Commission in 1916 are expressed in cents per 1,000 feet with a minimum requirement of 3,500 feet to the car. Using the basis of twelve pounds to the foot this scale of rates, effective throughout the restitution period, is materially lower than the scale prescribed by the unlawful order of the Interstate Commerce Commission and is lower

than the scale of charges fixed herein by the District Court as the basis of restitution.

Likewise the Seaboard Air Line Railroad had in effect during all of this period involved a point-to-point rate to Tallahassee, Florida, from Aucilla and Madison, Florida, (Claimants' Exhibit 1A), lower than its general scale above referred to.

The Florida East Coast Railway had in effect during the period of restitution rates on logs to Osceola and Melbourne, Florida, which only extended up to twenty miles (Claimants' Exhibit 3A), but which were the same as the "short log rate" and were lower than the charges fixed herein by the Court.

Shortly after the restitution period the Florida East Coast Railway established rates on the same level as the "short log rate" of the Atlantic Coast Line and the Seaboard Air Line in Florida (Claimants' Exhibit 3A).

We likewise showed log rates much lower than the charges fixed by the Court in effect in Florida during this period on the Apalachicola Northern Railroad (Claimants' Exhibits 3A), the South Georgia Railway (Claimants' Exhibit 3A) and the Georgia & Florida Railway (R. 479).

The burden of the railroad's argument with respect to the rate comparisons in the District Court, and no doubt it will be repeated here, was an "estimate" by Mr. Perrin that 90% of the logs which moved in Southern territory during the period here involved moved under rates equal to those charged and collected from these claimants. That "estimate" was a generalization without foundation in the record. Without taking into consideration any of the other rates to which we shall presently come, Mr. Perrin must know—for certainly the record discloses it fully, and we have above referred to the rates—that the rates on all trunk lines in Georgia, North Carolina and South Carolina, prescribed as *maximum* rates by the Railrod Commissions of those States, were substantially lower than the charges

here exacted. Surely much more than 10% of the logs in the South moved in those States. Far more than that per cent. of the lumber manufactured in the South was produced in those States (Exhibit 19-B). This is in addition to the numerous low rates we have shown and shall hereinafter show to have been in effect in every other State in the South, including Florida. That "estimate" could only have proceeded from a reckless disregard of the record which completely refutes it. We would be much more justified in guessing that, outside of Florida on the Atlantic Coast Line with respect to which this litigation was pending, not over 10% of the log traffic during the period involved moved under rates anywhere approximating the charges here exacted.

**(b) Comparison of Rates Per Car Regardless of Weight Established Since Restitution Period.**

The Atlantic Coast Line Railroad has here filed and principally relies in the matter of rate comparisons upon certain rates applicable during the restitution period on certain railroads. It proceeded to show (Defendant's Exhibit 44B) that sixteen railroads carried 94% of the log tonnage which was carried by Class I lines in Southern territory. It then showed certain log scales, principally interstate, on those sixteen railroads during the period involved, which scales were on substantially the same level as the scale prescribed by the unlawful order of the Interstate Commerce Commission.

Disregarding for the moment the fact that there were other and lower rates concurrently in effect on most of those railroads, which rates we shall hereinafter consider, we developed the fact that every one of those sixteen railroads except the Atlantic Coast Line Railroad and except the Clinchfield Railway and the Charleston & West Carolina Railway (both controlled by the Atlantic Coast Line, and likewise the two smallest log carriers of the sixteen rail-

roads listed), either had in effect during the restitution period rates on substantially the level of the Cummer Scale, or beginning in the early part of 1932 and continuing on into 1933 had put into effect rates which were on substantially the same level as the Cummer Scale.

These rates which were put into effect in 1932 and the first part of 1933 are published as "per car" rates, that is, they are flat rates applicable to any weight the car can carry, the shipper being permitted to load the car to its capacity without additional charge. They were voluntarily published by the railroads and to the extent of their application have replaced the very rates with which the Atlantic Coast Line Railroad has here sought to compare the Cummer Scale.

The Interstate Commerce Commission referring to these newly established rates in its report of January 9, 1933, (Defendant's Exhibit 2-B), found that "these rates are on substantially the same level as the Cummer Scale." Upon this point apparently there can be no dispute.

We have shown these rates to be applicable on 21 railroads operating in Southern and Southwestern territory. They are applicable in portions of every State in the South, including Florida. Some attempt has been made by the Atlantic Coast Line Railroad to minimize the importance of these rates by asserting that certain of them apply only to particular points. Mr. True, who has been connected with lumber companies and associations for the last fifteen or sixteen years and most of whose work has been with traffic and who now is secretary of the Southern Cypress Manufacturers Association, says that he knows of no milling point of any consequence in the Mississippi Valley, or in Alabama or Tennessee, except points on the Atlantic Coast Line, to which these new rates are not applicable (R. 768-769). He knows the important milling points and they are covered in the tariffs publishing these rates (R. 769). In order that the Court may see the general and

widespread application of these rates we have tabulated them at page B of the Appendix hereof, referring to the Exhibit number and setting forth the exact application of the rates. Most of them are likewise described at pages 470-480 of the record. These new rates constitute most convincing evidence that logs could not and would not move at the higher scales which those railroads had set up for themselves and with which the Cummer Scale had been compared by the Atlantic Coast Line Railroad. They demonstrate that the high rates prescribed by the unlawful order of the Interstate Commerce Commission for application in Florida will not move the traffic. After the railroads had succeeded in getting into effect these high rates and they had been in effect for a few years, Mr. Perrin testifying in the first part of 1932, said (R. 551): "I don't know of any State in the Southeast where they have now a large movement of logs." The Florida movement was large, and would still have been large if the Interstate Commerce Commission had left the rates alone. The logs are available and the lumber is being manufactured, but the railroads were not transporting the logs because of the high rates in effect. Defendant's Exhibit 19B showed that in the ten Southern states 5,218,061,000 feet of lumber were manufactured in 1931, yet we find that in 1930 (a better year than 1931) all of the Class 1 Railroads in the South only carried 3,674,951 tons of logs (Ex. 76-B). Converting these tons of logs into feet, on the basis of 12 pounds to the foot, we find less than one-eighth of all the logs manufactured into lumber were transported over these railroads. The rest of them got to the mill in some other fashion. It was imperative that the railroads do something about the rates or abandon the business. Almost with one accord they have announced that they prefer to have the business at rates at least as low as the Cummer Scale by publishing these new reduced rates. Upon this point we have the combined judgment of seventeen major

railroads operating in Southern territory against the judgment of the Atlantic Coast Line Railroad.

Some of these new rates—but far from all of them—were presented to the Interstate Commerce Commission in the re-opened proceeding. That Commission undertook to minimize the importance of these new rates for various reasons, but the fact remains that experience has thus demonstrated that the traffic will not bear more than these rates.

Likewise, we have in these new rates a new recognition of the principle that heavy loading instead of proportionally increasing the cost of the service increases it very little if at all. For it will be noted that these new rates are substantially the former minimum carload rates at the specified distances.

The only real change that has been made is that the minimum carload weight restriction, and the provision for payment on excess in proportion above that minimum, has been removed and the shipper has been permitted to load the car to capacity but required to pay only the same amount of freight he formerly would have paid on the lighter car, where there was no excess loading over the minimum weight. Note that when this change is made the resulting scale is almost identical with the Cummer Scale. There could be no simpler explanation of the origin and justification of the Cummer Scale. It required heavy loading (minimum 50,000 pounds) which resulted in economy of operation for the railroad and the rate gave the shipper the benefit of that economy.

### (c) The Economy of Heavy Loading.

The fact that heavy loading is the more economical method of transportation was attested to by the defendant's witnesses, Mr. Perrin (R. 721) and Mr. Lamb (R. 1082-1083). It was shown that in a hearing before the Interstate Commerce Commission in September, 1932, in a proceeding in-

volving rates on Florida fruits and vegetables Mr. Lamb had compared a car loaded with 23,000 pounds with one loaded with 100,000 pounds and showed that the cost in the first instance was 38 cents per ton for transporting 100 miles and in the second instance 14 cents per ton for the same distance (R. 1083).

Mr. Lamb insisted that this was only an illustration, but admitted that he had there testified that the illustration had been, until September, 1930, and then was, for dead freight, the actual operating schedule of the Atlantic Coast Line Railroad on its First Division (R. 1084). He was unable to point out any heavier loaded trains than the log train of the Wilson Cypress Company between Hines and Palatka, although he thought that the Atlantic Coast Line Railroad had such trains operating between Rocky Mount and Richmond (R. 1084). The illustration shows that the unit cost in the case of the lightly loaded car is almost three times that of the heavily loaded car. A similar illustration is set forth in Alldredge on Rate-Making for Common Carriers at page 66, and the same text refers to a proceeding involving rates on Florida fruits and vegetables, Florida Railroad Commission v. A. & R. R. Co., 144 I. C. C. 603, where the Interstate Commerce Commission said:

> "We have recognized in many reports the elementary principle of rate-making that an increased loading, which results in decreased cost of transportation, may well justify a lower rate for a higher minimum."

The principle is well established upon common sense and reason.

The car is the freight hauling unit. If the minimum required weight per car is low, the rate, as expressed in cents per hundred pounds, has to be high in order for the car to earn a certain revenue. The same revenue per car can be earned by requiring heavy loading, that is, by hav-

ing a high minimum required weight, and fixing a rate which is low when expressed in cents per hundred pounds.

We therefore desire to point out the revenue per car (of the minimum required weight) which the carrier collected under the rates *in effect intrastate in Florida, North Carolina and Georgia on the Atlantic Coast Line Railroad, and, in effect in Florida on the Seaboard Air Line Railway during the period involved* as compared with the revenue per car under the Cummer Scale and the scale prescribed by the unlawful order of the Interstate Commerce Commission. That is set forth at page C of the Appendix hereof. Such a comparison, which is the true and proper one to be made, showing as it does the revenue per car, does not show the Cummer Scale in anything like the unfavorable light which many of the comparisons made by the defendant, and the Interstate Commerce Commission in its reports, place it.

### (d) Comparison of Other Rates for Single Carload Shipments.

We have pointed out that all rates per car regardless of weight may be considered as being on at least as low a level as the Cummer Scale, because all the shipper has to do to bring them to or beneath that level is to load the cars heavily. The general and widespread application of those per car regardless of weight rates has occurred since the time of the shipments herein involved, but it is true that log rates established upon that basis are no new thing and numbers of them were in effect during the period here involved and are still in effect in Southern territory. We showed such rates then and now in effect in the States of Mississippi, Texas, Georgia, Kentucky and Tennessee upon the following railroads: Mississippi Central Railroad Company (Claimants Exhibit 7A); thirteen railroads in Texas (Claimants' Exhibit 10A and 11A); the Seaboard Air Line Railway and the St. Mary's Railroad (Claimants' Exhibit

25A); the Central of Georgia Railway (Claimants' Exhibit 31A); the Kentucky & Tennessee Railway (Claimants' Exhibit 31A); the Louisville & Nashville Railroad (Claimants' Exhibit 31A); and the Bonhomie & Hattiesburg Southern Railroad (Claimants' Exhibit 31A).

Some of the railroads have adopted the policy, instead of establishing log rates per car regardless of weight, of reducing the rate per hundred pounds and in general requiring a high minimum carload, so as to insure a certain minimum revenue per car, which is not substantially different from the minimum revenue they would otherwise have received per car under the higher rates, and given to the shipper the benefit of the economy effected by the heavy loading. Such rates were put into effect on the Seaboard Air Line Railway (Claimants' Exhibits 4A and 5A), the Alabama, Tennessee & Northern Railroad (Claimants' Exhibit 6A), the Central of Georgia Railway (Claimants' Exhibit 8A), the New Orleans & North Eastern Railroad (Claimants' Exhibit 31A), the Norfolk Southern Railroad (Claimants' Exhibit 31A), and the New Orleans Great Northern Railroad (Claimants' Exhibit 39A). All of those rates are on substantially the same level as the Cummer Scale, or between it and the scale of charges fixed by the District Court herein.

We call particular attention to the above mentioned rate of the New Orleans & North Eastern Railroad from New Orleans to Laurel, Miss., a distance of 146 miles. It is little more than half of the Cummer Scale, but is applicable when the logs are shipped in and the manufactured lumber shipped out over that railroad "via its long haul junctions." It is apparent that that railroad is satisfied with that rate if it gets a long haul on the outbound lumber. When we consider the length of the outbound haul on the lumber of the Wilson Cypress Company and the Cummer Cypress Company which the Atlantic Coast Line enjoyed, we consider this rate very material to the inquiry here.

The Cummer Scale was, so far as we know, the earliest exponent, as applied to logs, of this principle of requiring heavy loading at a rate which is low when expressed in cents per hundred pounds but insures the same minimum revenue per car as if the required loading were light and the rate per hundred pounds high.

We have likewise shown quite a number of log rates in effect in Southern territory during the period of restitution which were on substantially the level of the Cummer Scale, and which were not on a per car regardless of weight basis. Those rates were applicable in the States of Georgia, Florida, North Carolina, Virginia, Mississippi and Louisiana on the following railroads: Savannah & Atlanta Railway (Claimants' Exhibit 8A); Georgia & Florida Railroad (Claimants' Exhibit 8A); Atlantic Coast Line Railroad (Claimants' Exhibits 17A and 19A); Seaboard Air Line Railway (Claimants' Exhibit 25A); Norfolk Southern Railroad (Claimants' Exhibit 31A); Bonhomie & Hattiesburg Southern Railroad (Claimants' Exhibit 31A); Mississippi Central Railroad (Claimants' Exhibit 23A); and Tremont & Gulf Railroad (Claimants' Exhibit 41A).

The scale of charges fixed by the District Court is almost uniformly higher than all of these rates which it is compared with, including specifically the rates of the Atlantic Coast Line Railroad, and some of these rates are lower than the Cummer Scale. All of these rates were in effect throughout the period here involved.

We include all of these rate comparisons for the purpose of showing that even as applied to single carload, or casual shipments, there were many log rates with which the Cummer Scale bore no particularly unfavorable comparison, and particularly that there were many point-to-point rates, obviously designed to meet and accommodate traffic in volume, which were on substantially the same level as the Cummer Scale. Further, by the newly reduced rates applicable per car regardless of weight it has been demonstrated gen-

erally over the South and Southwest that the traffic will not bear substantially more than the Cummer Scale.

We come now to the cost studies as to the single carload shipments.

### (e) The Cost Studies With Respect to the Single Carload Shipments.

The computations of the Atlantic Coast Line Railroad upon this subject were made by Mr. Lamb, the General Auditor of that railroad. He did not investigate the actual amount paid out for wages and coal and the other elements of the out-of-pocket expenses in the movement of any particular log car or cars. Instead he caused to be determined the total out-of-pocket expense for *all* traffic which moved on the Atlantic Coast Line in Florida (the Third Division of that railroad) during the fiscal year ending June 30, 1929. He then determined the number of gross ton miles of *all* freight of that railroad in Florida during the same period, and divided the total out-of-pocket expenses in Florida ($2,059,610.66), by the total gross ton-miles in Florida (2,333,071,000), which resulted in an out-of-pocket expense per gross ton-mile of .0882888 cents (R. 673). This was the average out-of-pocket expense per gross ton-mile of *all* freight which moved in Florida during that year.

He then built up a total cost upon this unit of out-of-pocket expense by expanding, or multiplying, it and adding percentages of the result for taxes and profit or return on investment. This, under his theory, would give the total cost per gross ton-mile, and to determine the cost of a particular log movement it was only necessary to multiply by the gross ton-miles in that movement.

Dealing with the average car of logs which travelled 81.36 miles and was loaded with 56,754 pounds of logs, he determined two total costs, one of $25.23, and one of $34.32, both including taxes and return on investment at the rate

of 5 3-4% (R. 217-218). The Master found that the larger estimate "should not be given the same consideration as other estimates made" (R. 218).

To use the average out-of-pocket expense of all freight in Florida, including carload and less than carload, fruits, vegetables and other perishables, as being the average out-of-pocket cost of handling logs, a low grade commodity, is absurd. Further it is the use of a "system average" in determining the cost of handling a particular commodity, a thing which this Court and the Interstate Commerce Commission have both condemned.

Indeed, as the Master found, these very same cost studies were presented to the Interstate Commerce Commission in the re-opened proceeding and condemned by that Commission for that very same reason (R. 213).

Curiously enough this Court has decided this particular matter with respect to the particular commodity here under discussion. In the case of

> Northern P. R. Co. v. Dept. of Public Works, 268 U. S. 39,

the State railroad commission of the State of Washington had attempted to fix rates for the transportation of logs intrastate on the basis of costs as indicated solely by system averages, and this Court in emphatic language condemned that method and the result which it achieved.

The same position has been taken by the Interstate Commerce Commission:

> Calif-Growers & Shippers Protective League v. S. P. Co., 129 I. C. C. 25, 52.

The revenue actually received on this average car under the high rate charged was $31.12 (R. 218), or $5.89 per car more than Mr. Lamb's lower estimate.

Likewise this computation of Mr. Lamb's proceeded upon the theory that the traffic moved in single cars, and further

proceeded upon the theory that all of the cars were returned empty from the point of destination to the point of origin, the cost so calculated being thereby increased. The Master found (R. 218): "It is true that the charge the Master is to determine should not be estimated as if all shipments were in trainloads; but should be on basis that many were." Again he found (R. 216): "The Master thinks it was erroneous to treat all cars returning empty as was done in some computations."

The Interstate Commerce Commission in its report of July 5, 1932 (Exhibit 1-B, page 157 et seq. of Exhibits), in the re-opened proceedings concludes that operating costs per unit are generally higher in Florida than on the Atlantic Coast Line Railroad as a whole, and therefore concludes that the average cost of handling of one ton *of all commodities* on the whole Atlantic Coast Line Railroad system for one mile may be used as the basis for determining the cost of transporting one ton of *logs* one mile in Florida. Clearly this is an illogical assumption.

Average costs are higher in Florida than elsewhere on the system principally because it is a terminal State where traffic either originates or terminates and these terminal costs are high. The Master fully covered this subject (R. 208-211). But the railroad's own witness testified that without the fruit and vegetable traffic originating in Florida that railroad "would be in a hard way to exist" (R. 1075). And this terminal service on interstate transportation does not mean that intrastate traffic is more costly to handle.

The Interstate Commerce Commission made its computation upon the basis of the same average car (loaded with 56,754 pounds and travelling a distance of 81.36 miles) which Mr. Lamb used. This resulted in a cost of $17.07 per car, to which were added $1.99 for taxes and $5.63 for profit or return on investment, making a total of $24.69

per car (pages 210-211 of Exhibits). The Master said (R. 218): "This calculation was based on system average." We have shown that the charges actually paid on this average car were $31.12. So the Interstate Commerce Commission in that re-opened proceeding, met this difference by saying that its calculation of $24.69 per car understated the cost.

Having condemned Mr. Lamb's use of system averages in that very report, the Commission in the teeth of the decision of this Court and its own decisions proceeds to determine a purely system average cost of handling all freight traffic and label that determination "Estimated Cost of Transporting Logs in Florida" when the cost so determined has no more relation to the handling of a car of logs than it has to the handling of a car of early strawberries, and no more relation to handling any freight in Florida than it has to the handling of any freight in Virginia or Alabama.

Mr. Saunders, on behalf of the claimants, in his Exhibits 79-A, 80-A, 81-A and 82-A (pages 86 to 96 of Exhibits) has undertaken to determine the cost of this traffic, giving effect to the fact that more than half of it was in trainloads and thereby following the principle found proper by the District Court. We shall not elaborate upon his methods except to say that they are carefully and in detail explained in those Exhibits and in his testimony (R. 893-936).

Mr. Saunders thus found that the total cost or revenue which should have been derived from the entire log traffic here involved, including the same rate of profit which was earned on all other traffic of the railroad, was $141,310, or $13.19 per car. He stated that the revenue for the same average car during the same period under the Cummer Scale would have been $13.05 (See Exhibit 82-A, page 96 of Exhibits).

Mr. Saunders testified that his studies had convinced him that during the time when the Brooks-Scanlon train-

load movement was taking place that upon even a conservative estimate the Cummer Scale was producing a revenue which would meet all expenses and cover taxes and give a fair return on the property (R. 926).

Mr. Saunders' cost studies were fairly and honestly made, and the conclusions derived therefrom fairly and honestly arrived at. They were temperately presented and the fullest inquiry into them invited. There was no disposition on the part of Mr. Saunders to evade the direct and responsive answer to any question relating to them. The reply was criticism, not even based upon a reading of Mr. Saunders' testimony (R. 1004). We submit that these cost studies, evolved from a careful analysis of the system operating expenses, plainly demonstrate that on the trainload movements there was a profit under the Cummer Scale over and above all expenses, taxes and return on investment and that the traffic taken all together, trainload and carload, would under the Cummer Scale have paid almost exactly the same amount toward all expenses, including taxes and return on investment, as was paid in the same period by all other traffic.

## Summary of the Cost Evidence.

The cost evidence which we first discussed related to the handling of logs in trainloads, most of it dealing with the cost of the trainload movement from Hines to Palatka for the month of November, 1930, as being typical. It was found that the revenue per car from that movement under the scale of rates prescribed by the unlawful order of the Interstate Commerce Commission was $41.60 and under the Cummer Scale the revenue per car would have been $20.48. We have pointed out the cost estimates as follows:

1. The Master found that the cost per car as computed by the statistician of the Atlantic Coast Line Railroad was $27.18, including taxes and profit;

2. The Master found that the Interstate Commerce Commission computed the cost to be $27.52 per car, including taxes and profit;

3. The Master found that the statistician of these claimants made two estimates of the cost, one at $21.28 and the other at $18.21 per car, including taxes and profit.

The findings of the Master were confirmed by the Court. All of those estimates include profit or return on investment at 5 3-4%, which was far more than the railroad was earning on its freight traffic taken as a whole. Yet the Master fixed a "proper charge" of $34.42 per car.

Computations based upon the going, or market, charge for trackage at the time and in the same territory and the actual out-of-pocket cost of the trainload operation and the fair market price of the rental of the equipment used, demonstrate that there was a substantial surplus, over and above these elements of the cost containing profits themselves, even at the Cummer Scale on the trainload shipments. The estimates of Wilson Cypress Company, made at the beginning of the period involved in considering the operation of its own log trains over the carriers' tracks, and the actual experience of the lumber companies so operating their own trains at the time and in the locality here involved, confirm this fact, as do the cost studies made by the Atlantic Coast Line Railroad and the Florida Railroad Commission which appear in the former record.

This was confirmed further by the cost evidence relating to the handling of logs in single carloads which was all computed upon the basis of the average car (which travelled 81.36 miles, was loaded with 56,754 pounds of logs and produced a revenue of $31.12 under the rates actually charged). That evidence showed:

1. That the statistician of the railroad produced two estimates of total cost, one of $25.23 and one of $34.32 per car, both including taxes and profit, and both be-

ing based on system average costs, and that the Master found that the larger estimate was not entitled to as much consideration as other estimates made;

2. That the Interstate Commerce Commission produced an estimate of $24.69 per car, including taxes and profit, which it said understated the cost to some undetermined extent, and that that estimate was based on system average costs.

3. That the statistician of these claimants produced an estimate of $13.19 per car, including the same rate of profit and taxes that all other traffic earned, and that this estimate was based upon the log traffic here involved as a whole, including trainloads and single car shipments. This last is the only estimate based upon the principle which the Court said it applied in awarding restitution, namely fixing a uniform charge but taking into account the fact that more than half the traffic was in trainloads. The revenue under the Cummer scale would have been $13.05 per car.

We think that as applied to the trainload shipments the Cummer Scale was very profitable. Certainly its prima facie validity as applied to the trainload shipments could not be overcome on a record like this.

## POINT 8

IN APPLYING THE COMMON LAW STANDARD OF REASONABLENESS TO THE CHARGES FOR TRANSPORTATION SERVICES RENDERED IN THE PAST, THE DISTRICT COURT IN AWARDING RESTITUTION UPON SUCH STANDARD SHOULD NOT HAVE GIVEN CONSIDERATION TO (A) THE STATE STATUTES, OR (B) THE FEDERAL STATUTES, WHICH RELATE TO THE MAKING OF RATES TO BE ESTABLISHED FOR FUTURE APPLICATION.

**(This point is applicable to Assignments of Error numbered 9 and 10 of the State of Florida, et al., numbered 12 and 13 of Brooks-Scanlon Corporation, et al., and numbered 10 and 11 of Wilson Lumber Company of Florida).**

**The Common Law Standard of Reasonableness Did Not Require Rates to Be Uniform Regardless of the Circumstances and Conditions of the Service.**

The fact that in Florida the common law required only reasonableness and not uniformity or equality was decided by the early Florida case of

> Johnson v. Pensacola & Perdido R. Co., 16 Fla. 623 (1878).

That case was decided before any statutes were enacted with respect to discrimination or controlling the rates and practices of carriers.

In that case the facts were these: A concern known as Perdido Bay Lumber Company entered into a contract with the carrier in 1872 to loan it $10,000.00 with which to make an extension of its road. The loan was to be repaid by applying 20% of the freights thereafter paid by the Lumber Company to the railroad company. The railroad company agreed to make and publish a rate of $1.50 per thousand feet on lumber from Millview and vicinity to a terminus on Pensacola Bay and to maintain that published rate for ten years. It agreed that during that ten-year period the Lumber Company should have the right to ship from Millview and vicinity to the terminus up to thirty million feet of lumber per year, at fifty cents per thousand less than the published rate. This fifty cents per thousand feet was not to be applied upon the loan.

In 1877 one Johnson brought suit against the railroad company alleging that the carrier had charged him the published rate, or fifty cents per thousand feet more for handling his lumber than was charged the Perdido Lumber Company. The plaintiff's points of origin and destination and those of the Perdido Lumber Company were the same. The defendant railroad company filed pleas setting forth the facts and circumstances above set forth

surrounding the contract in justification of the difference in the charges. Final judgment was entered in favor of the defendant upon demurrer to the pleas and writ of error was taken. The reported case contains an exhaustive examination of the authorities laying down the rules of Common Law with respect to discrimination. The Court found that the railroad was a common carrier; that it must carry for all for reasonable remuneration (text 660); that reasonableness and not equality was the test and the requirement of the law (text 664). After a careful review of the authorities the Court concluded:

> "To sum the whole matter up, the common law is that a common carrier shall not charge excessive freights. It protects the individual from extortion, and limits the carrier to a reasonable rate, and this on account of the fact that he exercises a public employment, enjoys exclusive franchises and privileges, derived, in the case of defendant here, by grant from the State. *The rule is not that all shall be charged equally, but reasonably, because the law is for the reasonable charge and not the equal charge.*" (Italics ours).

The right of each shipper to a reasonable charge as declared by Johnson v. Pensacola & Perdido Railroad Company, supra, was reaffirmed by the Florida Supreme Court as late as 1912 in

> Cullen v. Seaboard Air Line Railway, 63 Fla. 122, 58 So. 182.

In the Cullen case the question arose as to whether or not the common law right of the shipper to sue for and recover from the carrier excess charges for the transportation of freight over and above a reasonable charge therefor was in effect in Florida. The Court there held that the common law right of the shipper to recover the difference between a reasonable charge and the sum exacted

still obtained in Florida. The sixth headnote (prepared by the Court) states the substance of the decision as follows:

> "6. Where a common carrier has exacted excess charges for the transportation of freight, such excess may be recovered in a common law action for money payable to the plaintiff for money had and received by the defendant for the use of the plaintiff, whether the charges exacted are in excess of reasonable rates at common law or are in excess of rates prescribed and made prima facie reasonable under statutory authority."

That case clearly demonstrates that the "common law standard" and the shippers' right to recovery according to it remains unchanged in Florida; that under that prevailing common law standard the shipper has the right to a reasonable rate even if it be different from any other charge which may be exacted by the carrier from that particular shipper or from other shippers. It is the case largely relied on by the carrier at the time of the first opinion of the District Court. It is the law here invoked by the carrier.

These cases clearly demonstrate that by the Florida law, if the charge in "each instance is measured by the common law standard of reasonableness," there can and will be no unjust discrimination against anyone, and they further demonstrate the error of the District Court in determining that *identity* or *uniformity* of *charge* level meets the requirement of the common law standard of reasonableness.

See also, to the same effect:

> State v. Cent. Vt. Ry. Co., 81 Vt. 463, 71 Atl. 494, 130 A.S.R. 1065;
>
> Concord & Portsmouth R.R. v. Forsaith, 59 N. H. 122, 47 Am. Rep. 181;

Alvinger v. South Carolina Ry. Co., 29 S. C. 265, 7 S. E. 493, 13 Am. St. Rep. 716;

Root v. Long Island R. Co., 114 N. Y. 300, 21 N. E. 403, 11 Am. St. Rep. 643;

Fitchburg R. Co. v. Gage, 12 Gray (Mass.) 393.

So, in

Smyth v. Ames, 169 U. S. 466, 540,

the Court held that the railroads were not bound to give absolutely the same rates to the people of all states, and, said the Court:

> "The kind and amount of business and the cost thereof are factors which determine largely the question of rates and these vary in the several states."

So, said the Court:

> "Comparisons * * * between the rates of two states are of little value unless all the elements that enter into the problem are presented."

There is no doubt that the "kind and amount of business and the cost thereof" are the factors which largely determine the question of charges under the Common Law. From the earliest times, the kind and volume of business and the cost of handling it have been among the most important elements.

In the case of

Nicholson v. The Great Western Ry. Co., 5 C. B. (N. S.) 366 (1858),

this fact is clearly illustrated. That case was decided under the English Transportation Act of 1854, shortly after its enactment. It involved an application under that act for an injunction to restrain the railway company from giving lower rates to Ruabon Coal Company than were

given to the plaintiff in that case for the shipment of coal. It appeared that there was a contract between the Railway Company and the Ruabon Coal Company by which the Coal Company undertook to ship for a period of ten years as much coal for a distance of at least one hundred miles over the defendant's road as would produce an annual gross revenue of £40,000 to the Railway Company. The shipment was to be made in fully loaded trains at the rate of seven trains per week. The cars of the plaintiff Nicholson originated at points of origin upon a different branch line of the railway company from those of the Ruabon Coal Company, but upon reaching the main line moved over the same tracks. The difference in total transportation and terminal charges between the trainload movement of the Ruabon Company and the carload shipments of the plaintiff Nicholson varied (according to destination) from 25% to more than 80%, in favor of the trainload movement. The plaintiff sought his injunction upon the ground that "there was an undue preference and undue and unreasonable discrimination shown". In passing on these facts the Court held that there was neither undue preference, prejudice nor unreasonable discrimination; that the preference or prejudice and discrimination referred to by the statute must be undue or unreasonable to be within the prohibition of the statute. It is to be borne in mind that the Nicholson case, supra, was decided shortly after the enactment of the English Railway Act of 1854, which prohibited undue preference and unreasonable and unjust discrimination. The Court recognized the propriety of the lower charge for the greater volume of business which under the circumstances in which it was tendered both as to regularity and quantity could be transported at a materially lower cost.

So far as we can find the principles laid down in that case have never been questioned by any court anywhere. It has been cited with approval many times by the Courts

of Great Britain as well as the courts, including the Federal Courts, of the United States.

The same rule is illustrated by another English case,

Strick v. Swansea Canal Co., 16 C. B. (N. S.) 1121, 143 Eng. Rep. 1126.

There the plaintiff had been charged 1-12 d. per ton mile for carriage over 4-7/8ths miles of the defendant's canal. In a suit against the Canal Company the plaintiff showed that the Canal Company was transporting over the same portion of the canal for an iron company large quantities of its product at 3/4d per ton mile for distances varying from 3-3/4 miles to 10-3/4 miles. The movement of the iron company was under a contract guaranteeing a large minimum quantity and a minimum toll. It was charged that the contract with the iron company was a violation of the Railway Traffic Act of 1854 with respect to undue and unreasonable preferences and unjust discrimination. The Court held the contrary and in so doing said:

> "It seems to me that the contract with Yetalyfera Iron Company falls exact within the principle which has been laid down as to railway companies by many cases in this court where it has been held that the company is guilty of no violation of the Railway Act of 1854 in carrying large guaranteed quantities of any description of goods for long distances and in full train loads at a lower rate than they will carry smaller quantities for less distances and without such guarantee. I see nothing unreasonable in such an arrangement."

See also:

Pickford v. The Grand Junction Ry. Co., 10 M. & W. 307, 152 Eng. Rep. 330, 336.

And the modern as well as the ancient authorities recognize that where there is a large amount of a product or commodity in the hands of a few persons which is

offered for shipment at stated intervals at fixed and continued quantities that fact may be considered in the transportation charge, recognizing the principle of selling cheaper at wholesale than at retail.

Interstate Commerce Commission v. C. & G. W. Ry. Co. 141 Fed. 1003, (supra), affirmed 209 U. S. 108, 52 L. Ed. 705.

We have shown that substantially all railroads in the South, including the Atlantic Coast Line Railroad, maintain from various points of origin to numerous manufacturing destinations, rates which are substantially lower than their ordinary log scales in the same territory. These point-to-point rates are made and maintained to meet a large volume of traffic in the commodity to which the rates are applicable. There are any number of them in existence in Florida, and almost every railroad tariff contains many of them. We have shown that to the destinations of the heaviest movement, viz., to Palatka, Lacoochee and Eastport, the movement was in such large, fixed, continuous and regular quantities as that substantially all of the logs to those destinations moved in shuttle-train fashion, in solid trainloads at a very low cost. No statute would be violated by the establishment of special rates to those points which were lower than the rates generally prevailing in the territory.

The fact that these movements were in trainloads is a mere incident to the volume and regularity of the traffic to these particular destinations, which volume and regularity are and properly should be bases of lower rates or charges, both by "common law standard" and the custom of rate-making as followed by the various commissions and the carriers themselves.

It is manifest that the charge fixed by the District Court for the transportation of logs to Palatka, Lacoochee and Eastport was grossly unreasonable as measured by the standards set forth in the authorities.

**The Interstate Commerce Act Is Immaterial and Irrelevant to the Issue Here Involved.**

The Court found that due regard to the State and Federal statutes with respect to the making of rates for the future must be given in fixing the proper restitution to be awarded the claimants here (R. 350). So far as the Federal statutes are concerned this must refer to the Interstate Commerce Act.

The Atlantic Coast Line asserts that the Interstate Commerce Act is self-executing, that the charge to be here fixed must be such as to cause no discrimination against persons or localities or against interstate commerce and that since the Interstate Commerce Commission has prescribed an *interstate* rate from points in the Northern part of Florida to points in Georgia, the Court is prohibited from determining a reasonable charge upon any basis other than this *interstate* rate which was the same as the rate actually charged. All of these assertions are based on Sections 3, 13 (4) and 15a of the Interstate Commerce Act. Section 3 of the Interstate Commerce Act prohibits unjust discrimination against persons and localities in interstate commerce. Section 13 (4) in effect reenacted the provision of Section 3 with respect to unjust discrimination against persons and localities in interstate commerce. In addition it prohibited undue, unreasonable or unjust discrimination against interstate commerce itself. And under certain limited circumstances it authorized the Interstate Commerce Commission upon findings made *after* a full hearing to remove the several unjust discriminations prohibited by prescribing the rate *thereafter* to be charged. Section 15a was the so-called revenue section which provided for the grouping of the railroads of the country into territorial rate groups, and which contained the Recapture Clause, and the like. The foregoing sections of the Act are set out in the Appendix of this brief.

The position of the carrier is that both Sections 3 and 13 (4) are self-executing; that no findings or orders of

the Interstate Commerce Commission are required to place in motion the exercise of the Federal power; or, that if any such findings were required, the District Court could supply them from the ancient report of the Interstate Commerce Commission which was stricken down by this Court for want of "basic or essential findings". Apparently it has some idea that those findings still have some validity, and repeatedly asserts that the error of the Commission was only "procedural".

If any of those contentions are sound, then this Court did a vain and useless thing in reversing the decree of the District Court in the first instance and in setting aside the order of the Interstate Commerce Commission.

This Court there said (Florida v. United States, supra., at page 212):

> "The Commission has no general authority to regulate intrastate rates and the mere existence of a disparity between particular rates on intrastate and interstate traffic does not warrant the Commission in prescribing intrastate rates. Arkansas Railroad Commission v. Chicago, Rock Island & Pacific Railroad Company, supra."

And again this Court said (at page 212):

> "In the present instance, the commission did not undertake to establish a statewide level of rates for the interstate transportation of logs, and in order to sustain the statewide order as to intrastate rates (as one needed to avoid an undue burden on the revenues of the carrier and a consequent interference with the maintenance of an adequate transportation system) it must appear that there are findings, supported by evidence, of the essential facts as to the particular traffic and revenue, and the effect of the intrastate rates, both as existing and as prescribed, upon the income of the carrier, which would justify that conclusion. • • •

"The raising of rates does not necessarily increase revenue. It may in particular localities reduce revenue instead of increasing it, by discouraging patronage. (1) Railroad Commission v. Chicago, Burlington & Quincy Railroad Company, 257 U. S. 563, 66 L. Ed. 371, 22 A. L. R. 1086, 42 S. Ct. 232, supra. The Commission stated in its report that witnesses for the Florida interveners had testified 'that any material increase in the Florida intrastate rates would either cause them to move their plants to the timber or abandon operations', and that in either event the carrier would lose considerable traffic.

"The Commission made no findings as to the revenue which had been derived by the carrier from the traffic in question, or which could reasonably be expected under the increased rates, or that the alteration of the intrastate rates would produce, or was likely to produce, additional income necessary to prevent an undue burden upon the carrier's interstate revenues and to maintain an adequate transportation service.

"The question is not merely one of the absence of elaboration or of a suitably complete statement of the grounds of the Commission's determination, to the importance of which this Court has recently adverted (Beaumont, S. L. & W. R. Co. v. United States, decided November 24, 1930, 282 U. S. 74, ante, 221, 51 S. Ct. 1, but of the lack of the basic or essential findings required to support the Commission's order, • • •

"We conclude that the portion of the order of the Commission which is now under review, with respect to intrastate rates, is not supported by the findings of the Commission and this part of the order must be set aside."

Obviously the opinion of this Court in this very case directly disposes of these assertions of the carrier. But it was again disposed of by this Court after the coming down of the opinion. A few days after that opinion was filed the carrier filed in the Supreme Court a motion in which

it set up, among other things, that the evidence before the Interstate Commerce Commission in the proceedings before it was in the movant's opinion, "sufficient to justify findings of additional facts to comply with the requirements of the law as stated in this Court's said opinion as to discrimination against general interstate commerce".

The movant then represented:

> "That it is to the interest of justice that the status fixed by the Commission's order, which has been in effect from the 8th day of February, 1929, as aforesaid, be maintained until the Commission has again considered the record and the cause in the light of said Court's said opinion. It is likely that, if the court's order becomes effective without further hearing and action by the Commission, it may bring a demand against the Atlantic Coast Line Railroad Company for substantial reparation, and that a failure to have further determination of the subject matter by the Commission may do this movant a great injustice for which there will be no relief, and in the meantime the rates here involved will continue to be an unjust discrimination against interstate commerce and against persons and places and particular classes of traffic, thereby working irreparable damage not only to this movant but to the public."

The movant offered to enter into a bond conditioned to hold harmless the appellants or any shipper who might be injured or damaged by the action of the Court therein prayed for or otherwise conditioned. Thereupon, the movant prayed that the Court withhold the sending down of its mandate until the Commission had acted in the cause in the light of the opinion of the Supreme Court, or, that the Court in sending down its mandate to the District Court direct that Court to maintain the status as to intrastate rates until the Commission had acted or until the Court for cause shown shall otherwise have ordered.

This Court on January 26, 1931, entered an order deny-

ing the motion of the carrier. On February 13th, 1931, the Court transmitted to the District Court its mandate in the usual form.

Manifestly, this Court did not consider that the vice in the report of the Interstate Commerce Commission was merely "procedural" as asserted here, or that any section of the Interstate Commerce Act was self-executing; or, that any Court could or should invade State domain and intermeddle with intrastate rates until the Interstate Commerce Commission had made the basic and essential findings to which the Court referred in its opinion.

Surely this is enough, but we cannot refrain from citing one additional decision of this Court which is squarely on the mark. That case is

> Board of Railroad Commissioners of the State of North Dakota v. Great Northern Ry. Co., 281 U. S. 412, 74 L. Ed. 936.

In that case the District Court of North Dakota had enjoined the enforcement of an order of the State Board of Railroad Commissioners prescribing intrastate rates pending the determination by the Interstate Commerce Commission as to whether the rates prescribed by the State Commission caused an undue or unreasonable discrimination against interstate commerce. Two proceedings were pending before the Interstate Commerce Commission and the Great Northern Railway Company had also filed a complaint before the Interstate Commerce Commission alleging that the new state rates would unjustly discriminate against persons and localities in interstate commerce and would constitute an unreasonable burden on interstate commerce. Upon this state of facts, the District Court had granted an interlocutory injunction restraining the state commission from putting into effect the state rates until the Interstate Commerce Commission had determined

whether the intrastate rates would be an unjust discrimination against interstate commerce.

This Court held in effect that no court had jurisdiction to enforce the provisions of the Interstate Commerce Act with respect to intrastate rates until appropriate findings and orders with respect to such intrastate rates have been made by the Interstate Commerce Commission.

The Atlantic Coast Line here asserted that the provisions of the Interstate Commerce Act are such that it was the duty of the Court on the former reference to have found the Cummer Scale to be void merely because it was lower than the interstate rate fixed by the Commission, although the District Court found that there was no interstate traffic in logs under that rate (R. 353). In the North Dakota case the same contentions were asserted. But the Court examined its decisions and held that the primary duty of determining the question of unjust discrimination was with the Interstate Commerce Commission, and not with the Court. The Court said (281 U. S. text 427):

> *"We find no basis for the conclusion that it was the purpose of Congress to interdict a state rate, otherwise lawfully established for transportation exclusively intrastate, before appropriate action by the Interstate Commerce Commission."* (Italics ours).

On the subject of this assertion of the carrier the District Court said (R. 351):

> "The prior findings of the Interstate Commerce Commission in 1928 which resulted in no valid order had no legal effect and can be given only such weight and persuasiveness as their reasoning carries with it. There is, of course, no rigid necessity for intrastate rates to conform with interstate rates. They frequently do not conform, and where there is divergence it becomes a question which are the more just and reasonable".

In the light of what was said and done in this Court

in this very case, and in the light of the decision in the North Dakota case, supra, it does seem beyond all reason for the carrier to assert that either Section 3 or Section 13 are self-executing, or that the courts can take any action with respect to either of them in this proceeding.

**The Findings of the Court and Master that Consideration Should Be Given, in Fixing the Restitution Here, to the State and Federal Acts with Respect to the Making of Rates to Apply in the Future, is Erroneous.**

We have pointed out that the District Court and the Master found that in fixing these charges for past shipments consideration should be given to the statutes relating to the fixing of rates for the future. If it is thereby intended that the Court should enter into any consideration of whether the charges fixed by it cause any unjust discrimination against persons or localities or against interstate commerce, then this finding is in the teeth of the North Dakota case, supra, where it was so clearly determined that the Court had no power to enforce the provisions of the Interstate Commerce Act until the Interstate Commerce Commission had held appropriate hearings and entered appropriate orders. A railroad could come into the Federal Court with the clearest kind of showing of unjust discrimination against interstate commerce by intrastate rates and it would be entitled to no relief until the Interstate Commerce Commission had made a valid order upon the subject. Nothing could be more definitely settled than that is by the North Dakota case. How then can the Court give consideration to or be influenced by the policy of that act or any act authorizing any commission to make rates for the future? Yet the District Court in its opinion said (R. 351):

"The prohibition of federal law aimed at discrimination by state rates against interstate commerce is

not easily applicable to such a case as this, because the existence thereof involves questions so technical and complex as not to be well examinable in a court trial and is referred by the statutes specially to the Interstate Commerce Commission; but the fact that such discrimination is prohibited is a matter that should have some bearing on the present problem."

The Master apparently took the position that in determining a reasonable charge to be made he must transmute himself from a judicial officer to an administrative board, viz., a railroad commission, and must turn back the clock until a day antecedent to the day on which any one of the several shipments were made, and must, in the light of the facts which he finds to have existed, establish a charge to be applicable as for the future to each of the several shipments of logs which are here at bar. For he finds that in determining these charges for the past, "every element and factor that should be considered in making rates for future application should likewise be considered". (R. 194). And the District Court apparently proceeded upon the same theory.

Even if there were any soundness in the theory that the Master must in effect exercise legislative power, the power to be exercised would be the power to fix rates to the particular points of destination from the particular points of origin which are here involved. And in so prescribing legislative future rates (or laws of commerce, as the Court described them), it would be the duty of the Master, "in each instance" to examine the circumstances and conditions under which those particular movements would take place, and to establish the future rate for that movement accordingly. Establishing even future rates to those several destinations "in each instance" upon the same level (and to have thus ignored the most potent factors in rate making such as cost of service, regularity and volume of movement, and the value to the shipper) would have con-

stituted that unreasoning equality (of level) which the authorities have so repeatedly condemned as inequality and would have violated the fundamental common law right secured to each shipper, viz., to himself enjoy a reasonable rate in each instance.

Louisville & Nashville Railroad Company v. Garrett, 231 U. S. 298,

was cited by the District Court in re-referring this cause to the Master. In that case the Railroad Commission of Kentucky had prescribed maximum freight rates for intrastate traffic from three points of origin to sixteen points of destination. These rates were different from and lower than the rates from other origins to other destinations. The carrier had for many years given these special rates to owners of distilleries along its line but had withdrawn [illegible], and the Kentucky Commission had ordered them to be reinstated. The carrier contended that the rates prescribed between the three points of origin and the sixteen points of destination would result in unjust discrimination and undue prejudice against some thirty-two other distillers stationed on the line of the carrier. After brushing this contention aside, the Court said:

"But, aside from these considerations, we find the objection to be without merit. The Commission dealt with the question before it, and, on complaint as to the rates to the sixteen points of destination, ordered what it found to be reasonable rates for that transportation. In so doing, it acted in conformity with the statute. To give legality to its order as to the particular rates in question, it was not necessary for the Commission to require a reduction in other rates. Certainly, the fact that the other rates described, which had not yet been passed upon by the Commission, might likewise be open to the objection of unreasonableness and that their maintenance by the appellant might lead to unjust discrimination, would

furnish no basis for restraining the enforcement of the Commission's order if that order were otherwise valid."

The Court also said:

"In the absence of a legislative rate, it is the province of the courts in deciding cases that arise between shippers and carriers to pass upon the reasonableness of the compensation which the carrier has demanded for its services. In so doing, the Courts apply the common law."

In the Garrett case (as in the case at bar) the Court particularly points out that the making of a rate is a "legislative rule for the future" and that the ascertainment of a reasonable charge for the past is a separate and distinct proposition.

In this connection this Court in the Garrett case, said:

"It thus appears that the two proceedings, though they were conducted at the same time, were distinct in their nature. The one resulted in a legislative rule for the future; in the other, there was an award of specific sums of money to particular persons upon the basis of past transactions. * * * ". (231 U. S. 319).

The language of the District Court in re-referring the matter was with direction that he (the Master) ascertain whether the charge made by the carrier for transportation in each instance was a reasonable one as measured by common law standard, and if not, what was the reasonable charge to be made, and that he measure and award to each claimant restitution accordingly". That language is sustained by the Garrett case, supra. The District Court declared that "It is the ancient issue of quantum meruit". And quantum meruit means, of course, no more nor less than what is deserved for the particular service which is performed for the particular shipper. 51 CORPUS

JURIS 116. The common law right to a reasonable rate to be judicially determined upon the ancient issue of quantum meruit is reserved to the shipper today.

Johnson v. Pensacola & Perdido R. Co., supra;

Cullen v. S. A. L. Ry. Co., supra.

This is far different from the prescription of a general level of rates for the future.

**Neither the Report of the Interstate Commerce Commission Dated July 5th, 1932, Nor the Report of January 9th, 1933, Nor Any Report or Order Made by the Interstate Commerce Commission, After the Time of the Shipments here Involved, Can Have Any Retroactive Effect Upon the Determination of the Reasonableness of the Several Charges Made for the Transportation of Logs in Florida During the Restitution Period.**

The Master discussed the making of the reports and orders of the Interstate Commerce Commission of July 5, 1932 (186 I. C. C. 157) and of January 9, 1933, (190 I. C. C. 588) in the re-opened proceedings and found (R. 200):

> "The Master thinks the report should be considered in this investigation but nothing stated in there, including its findings, are binding on the Master in considering or deciding any of the questions or issues before him."

The Master then found that in many instances the evidence before the Commission was substantially the same as that before him, and stated that he would frequently refer to statements in those reports where that evidence was succinctly stated and readily accessible. (R. 200). He likewise quotes from the case of Atchison, Topeka & Santa Fe Ry. Co. v. United States, 284 U. S. at page 248, a statement to the effect that a record closed in 1928 will not support an order of the Commission in 1931 as it "pertains to

a different economic era and furnishes no adequate criterion of present requirements" (R. 199). The rate prescribed for the future in July, 1932, and January, 1933, was applicable to a different economic era from 1929 and 1930 when these shipments were made.

The Atlantic Coast Line Railroad seems to entertain the view that these subsequent reports and orders of the Interstate Commerce Commission in some fashion dispose of this case and oust the Court of jurisdiction.

These reports of the Interstate Commerce Commission were made approximately one and one-half and two years, respectively, after the conclusion of the restitution period. They relate in terms only to the rate to be charged in the future. The authority of that Commission in prescribing rates is limited to prescribing rates for the future. It has no authority to fix a rate for the past, and if it undertakes to do so the order is void.

> United States Code Annotated, Title 49, page 386;
> B. & O. R. C. v. United States, 43 F. (2d) 603, affirmed 284 U. S. 195.

In affirming the case last mentioned the Supreme Court said:

> "The Commission had no power to put this order into effect as of a prior day; * * * accordingly, the order * * * was wholly ineffective."

In the opinion upon the re-reference of this cause to the Master, the District Court said (R. 171):

> "A commission rate is a legislative act made through a deputy, a law of commerce having only a *prospective* operation." (Italics ours).

And in its final opinion, the District Court said (R. 351):

> "Nevertheless we agree with the Master that the decision of the Interstate Commerce Commission on

July 5th, 1932, that the Cummer scale resulted in discrimination against interstate commerce as respects the carrier's revenues and that for the future a state rate conforming to the interstate rates on logs be applied has no retroactive effect and does not constrain a finding that in 1929 and 1930 the interstate rates were the only just and reasonable charge in this intrastate traffic."

The railroad seems to derive some comfort on this subject by relying upon the case of

United States v. N. Y. Central R. Co., 279 U. S. 77.

There the Commission was held to have power to adjust past compensation for carrying the mails from the time that application for such adjustment was made. The decision was based upon the particular statute giving the Commission power to fix the compensation and the fact that the carriers were required under penalty to carry the mail, and the construction which the Court, therefore placed upon the statute, namely, that it implied the power to retroactively adjust the compensation. The case can have no application here.

The rate prescribed by a commission for the future has been held to be irrelevant and immaterial to an issue as to what was a reasonable charge for the past:

Anniston Mfg. Co. v. Southern Ry. Co. (Ala.), 40 So. 965.

So also may be a subsequent decision of a court:

The Board of Commissioners of North Dakota v. Great Northern Ry., 281 U. S. 412.

See also

Ex Parte Lincoln Gas & Electric L. Co., 257 U. S. 6, where the Court said:

"The beginning of the new suit, and the granting of a restraining order therein, can properly have effect only with respect to the then future operation of the ordinance and cannot effect the measure of recovery to be applied by the District Court in awarding restitution for the period covered by the former suit; much less its jurisdiction to award such restitution." (Citing cases).

The decision in February, 1933, of the United States District Court for the Northern District of Georgia refusing to set aside these prospective orders of July, 1932, and January, 1933, of the Interstate Commerce Commission, or the decision in April, 1934, of this Court sustaining the decision of the lower court, cannot alter the situation here. Those decisions only mean that the prospective order of the Commission is valid. The opinion and decree of the Court in that case adjudged only that the Interstate Commerce Commission in fixing the rates for the future was acting within the scope of its authority.

It must always be borne in mind that in the case at bar under present circumstances we are not dealing with a rate but we are dealing with a charge, the reasonableness of which with respect to each claim and each shipper must be determined by the Court. And the circumstances and conditions under which each such shipment or class of shipments actually did move (including the character of the movement, its volume, and the trouble, expense and responsibility attending its receipted carriage), together with the value of the transportation to the shipper, must determine the reasonableness of each particular movement. This was and is the Common Law.

Johnson v. Pensacola & Perdido R. Co., 16 Fla. 623, supra;

Cullen v. Seaboard Air Line Ry. Co., 63 Fla. 122, supra;

Nicholson v. Great Western Ry. Co. (England), 5 C. B. (N. S.) 366, supra;

Fitchburg R. Co. v. Gage (Mass.), 12 Gray 393, supra.

So of course an order and report of an administrative body, made after the time of the shipments involved, dealing prospectively with a future rate, and a decision relating to such order and report, are without force or effect in this proceeding.

## POINT 9.

IN APPLYING THE COMMON LAW STANDARD OF REASONABLENESS TO THE CHARGES HERE INVOLVED, THE DISTRICT COURT IN AWARDING RESTITUTION UPON SUCH STANDARD SHOULD NOT HAVE GIVEN CONSIDERATION TO DISCRIMINATION OF ANY SORT, EITHER AS BETWEEN PERSONS OR LOCALITIES OR AS AGAINST INTERSTATE COMMERCE, UNDER (A) THE FLORIDA STATUTES, OR (B) THE FEDERAL STATUTES.

**(This point is applicable to Assignments of Error numbered 11 to 14 of the State of Florida, et al., numbered 14 to 17 of Brooks-Scanlon Corporation, et al., and numbered 12 to 15 of Wilson Lumber Company of Florida).**

The argument hereinbefore set forth is applicable to this point but we shall go further in our examination of the statutes.

### The Existing Constitution and Statutes of Florida on Unjust Discrimination.

The existing Constitution and Statutes in Florida with respect to unjust discrimination do not require equality in charge either to different destinations on the same railroad or from different points of origin to the same destination or from the same destination to the same points of origin, or in any instance where the circumstances and

conditions of the service are materially different. As we have seen, they do not alter the right of the shipper under the common law to a reasonable rate in every instance nor the common law standard for determining a reasonable rate.

Section 30 of Article XVI, of the Constitution of the State of Florida, is as follows:

> "The Legislature is invested with full power to pass laws for the correction of abuses and to prevent unjust discrimination and excessive charges by persons and corporations engaged as common carriers in transporting persons and property, or performing other services of a public nature; and shall provide for enforcing such laws by adequate penalties or forfeitures."

Paragraph 4 of Section 6 of Chapter 4700, Acts of 1899, as amended by Chapter 6527, Acts of 1913, and as further amended by Chapter 8469, Acts of 1921, the same being Section 6703, Compiled General Laws of Florida, Section 4818, Revised General Statutes, provides that it shall be the duty of the Railroad Commission,

> "4. To make reasonable and just rules and regulations for the prevention of any unjust discrimination against persons or localities in charges or in furnishing facilities."

The Florida statutes upon the subject of unjust discrimination in Florida are as follows:

Section 4 of Chapter 4700, Acts of 1899, as amended by Chapter 10235, Acts of 1923, being Section 6699, Compiled General Laws, Section 4614, Revised General Statutes:

> "UNJUST DISCRIMINATIONS BY COMPANIES PROHIBITED. If any railroad, railroad company or other common carrier as aforesaid, shall make any unjust discriminations in its rates, or charges of toll, or compensation for the transportation of passengers

or freight of any description, or for the use and transportation of any railroad car upon any railroad, or upon any of the branches thereof, or upon any railroad or steamship lines connected therewith, which it has a right, licence or permission to operate, use or control within this State, the same shall be guilty of violating the provisions of this Chapter, and upon conviction thereof shall be dealt with as hereinafter provided: Provided, that nothing in this section or section 6627 shall prevent any railroad, railroad companies or other common carriers subject thereto from giving reduced rates for the transportation of freight wholly within the State of Florida for the encouragement of manufacturing industries within the State of Florida; Provided, that such reduced rates shall be given without discrimination and shall be published in the schedules and rate sheets of such common carriers."

This statute has been construed more than once by the Florida Supreme Court.

State, ex rel Railroad Commissioners, vs. F. E. C. Ry. Co., 64 Fla. 112, 59 So. 385.

There the mileage scale of passenger rates was three cents per mile. In the transportation of passengers the defendant made an additional charge for the drawbridge at Jacksonville of fifteen cents per passenger, and for the bridge over the Halifax River, twenty-five cents per passenger. In addition there was a charge of twenty cents per passenger between Palatka and points South. This charge was in excess of the regular mileage scale. The Railroad Commission brought a mandamus in the Supreme Court of Florida against the Railroad Company to require it to discontinue such charges. The Court examined the statute quoted above and declared that discrimination as such was not forbidden by it, but only unjust discrimination. It found that there was no showing that this

particular discrimination on the rates to and from Jacksonville, to and from Palatka and points South or over the Halifax River was an unjust discrimination. The Court said:

> "The statute does not forbid discriminating charges by common carriers, but it does forbid charges that unjustly discriminate, as well as charges that are unreasonable and unjust."

Also, in,

> State ex rel. Railroad Commissioners vs. A. C. L. R. R. Co., 59 Fla. 612, 52 So. 4 (1910),

the Supreme Court of Florida had occasion to examine the statute laws of the state with respect to unjust discrimination. The question there was the validity of Rule 15-a prescribed by the Florida Railroad Commission. That rule fixed a rate, viz.,

> "The charge for switching cars of rough lumber to • • • any planing mill in the Jacksonville yards, and, thence, if the lumber is dressed, to any point in the same yards, shall not be more than $2.00 per car; • • • when the said switching movement is over the tracks of more than one railroad, a charge of not more than $3.00 may be made".

There existed also Rule 15, prescribed by the Florida Railroad Commission which fixed a flat charge of $2.00 per car. Rule 15 was applicable to freight cars generally and to all railroads in Florida. It will be observed that under Rule 15-A, two switching operations might be had for $2.00. Under Rule 15 only one switching operation could be had for that sum. Rule 15-A was under attack as being unjustly discriminatory.

The Supreme Court of Florida sustained the rule, and in so doing, said in part as follows:

> "The alternative writ does not show that the rate fixed by the Commission in Rule 5-A is unreasonable,

unjust or exorbitant or unjustly discriminatory in amount against any other locality or person. * * * It is not essential to the validity of Rule 15-A that it should prescribe or fix one rate for the service to be rendered in all markets and localities of the State. *A uniform rate is not essential to its legality. The circumstances of each road and each market or locality must determine the rates of toll to be properly allowed for this service; and the cost thereof may be greater or less in one city than in another.*" (Italics ours).

The opinion just cited was written by the Florida Supreme Court upon a motion to quash the alternative writ of mandamus in that Supreme Court. Upon the return to the answer the same question was again raised.

State ex rel, Railroad Commissioners, vs. A. C. L. R. R. Co., (1910) 60 Fla. 218, 53 So. 201.

There the Court said in part:

"As we took occasion to say, on the motion to quash the alternative writ, (59 Fla. 612, 52 South. Rep. 4) 'the circumstances of each road and each market or locality must determine the rates of toll to be properly allowed for this service. The carrier is entitled to receive some compensation beyond the mere cost of this service, and the cost thereof may be greater or less in one city than in another.' A uniform rate is not essential to the legality of this rule; neither is it essential to its validity that the commissioners should have regulated or attempted to regulate the charge or rate for this service in other places or railroad yards than the city of Jacksonville. It may be that the railroad companies have been charging lower or reasonable rates for this service at such other points. It may be that the railroad companies at such other places are performing this service for a rate acquiesced in by the public and the Commissioners as a reasonable and just one, and that the occasion has not arisen for the regulation of the rate by the Commissioners in the exercise of its supervisory power."

It is only unjust discrimination that is condemned with respect to future rates.

State v. Jacksonville Terminal Co., 106 So. 576; 90 Fla. 721;

L. & N. v. Speed-Parker, 137 So. 724, 103 Fla. 439.

We have shown in this brief that substantially all logs moving to any particular destination during the restitution period moved under substantially the same circumstances, whether they moved in trainload quantities or in single car loads. That is to say, there was little or no carload shipments to destinations to which the shuttle-trains moved, and vice versa. The trainload movements to Palatka, to Lacoochee and to Eastport moved under substantially different circumstances and conditions from the other movements. Since we are here dealing with charges for past services the statutory provisions with respect to future charges can have no application. But even if the Florida statutes with respect to future statutory rates were applicable it is manifest that the Florida cases quoted above clearly demonstrate that there is no unjust discrimination.

See also:

L. & N. R. Co. v. Garrett, 231 U. S. 298, 58 L. Ed. 229, supra.

**The Authorities Relied Upon by the Railroad Upon the Subject of Unjust Discrimination in the District Court.**

In this connection the carrier has relied upon two cases which it contends support its position that inequality of charges regardless of the circumstances and conditions under which the charge was made is an unjust discrimination. Those two cases are:

Western Union Telegraph Co. v. Call Publishing Co., 181 U. S. 92, 45 L. Ed. 765, and

Interstate Commerce Commission v. B. & O. Ry. Co., 43 Fed. 37, supra.

Neither of those cases support the contention of the carrier to any extent. On the contrary they sustain the position of the claimants that even if state or federal statutes are applicable here at all, such statutes prohibit only *unjust* discrimination and that differences in circumstances and conditions of the transportation service warrant a different charge.

In the case of Interstate Commerce Commission v. B. & O. Railway Company, supra, the question before the Court was whether a party rate ticket whereby ten or more persons were transported for two cents per mile per capita, was an unjust discrimination, where a single passenger was charged three cents per mile. This case cites the *Johnson v. Pensacola & Perdido R. R. case, 16 Fla. 623.* It discusses the English cases at length. It shows that quantity of traffic should be considered in determining what is a reasonable charge. It establishes that at common law a carrier had a right to make lower rates, based on increased quantity or amount of service. It clearly enunciates the well-settled principle that *discrimination,* as distinguished from *unjust discrimination* is prohibited by neither the common law nor statutory law.

In upholding the right to charge less per capita for the party rate ticket the opinion clearly points out that the discrimination "which the act to regulate commerce sought to remedy and correct was the practice of showing favoritism and partiality between their (common carriers') customers or localities under the same or substantially the same circumstances and conditions".

The other case referred to above and relied upon by the carrier is

Western Union Telegraph Co. v. Call Publishing Co., supra.

In that case it appeared that the plaintiff sued to recover overcharges, alleging that it had been unjustly discriminated against in that the defendant had charged it $5.00 per hundred words for press dispatches, and had charged another only $1.50. In that case this Court said:

> "Common carriers, whether engaged in interstate commerce or in that wholly within the state, are performing a public service. They are endowed by the state with some of its sovereign powers, such as the right of eminent domain, and so endowed by reason of the public service they render. As a consequence of this, all individuals have equal rights both in respect to service and charges. Of course, such equality of right does not prevent differences in the modes and kinds of service and different charges based thereon. There is no cast iron line of uniformity which prevents a charge from being above or below a particular sum, or requires that the service shall be exactly along the same lines. But that principle of equality does forbid any difference in charge which is not based upon difference in service, and, even when based upon difference of service, must have some reasonable relation to the amount of difference, and cannot be so great as to produce an unjust discrimination."

As we have pointed out, the above cases support the contention of the claimants rather than the contention of the carrier.

**The Federal Statutes with Respect to Unjust Discrimination in Interstate Commerce.**

It is so manifest that the Federal statutes with respect to unjust discrimination are inapplicable to the case at bar that no extended discussion in that connection is necessary. Therefore, we shall merely pause to point out that under the decisions of this Court and of the Federal Courts generally it is recognized that it is only unjust dis-

crimination that is prohibited by the drastic terms of the Interstate Commerce Act.

Interstate Commerce Commission v. Alabama M. R. Co., 168 U. S. 144, 42 L. Ed. 414;
Interstate Commerce Commission v. B. & O. Ry. Co. 43 F. 37;
Penn Refining Co. v. Western N. Y. & P. R. Co., 208 U. S. 208, 52 L. Ed. 456.

The District Court itself pointed out (R. 351):

"There is, of course, no rigid necessity for intrastate rates to conform with interstate rates. They frequently do not conform, and where there is divergence it becomes a question which are the more just and reasonable".

Another case which illustrates that inequality of condition or circumstances justifies an inequality of charge, is

Penn Refining Co. v. Western N. Y. & P. R. Co., 208 U. S. 208, 52 L. Ed. 456.

It appears in that case that the plaintiff and others shipped oil by barrels over defendant's railroad and were charged 52 cents for the oil and 14 cents for the barrel, making a total charge of 66 cents per barrel. Still others shipped oil in their own tank cars, no charge being made for the tank cars, and the charge being limited to the amount of oil actually carried. It also appeared that the plaintiffs could not have used tank cars, as they had no facilities to load or unload them. The Court held that the difference in the charges constituted no discrimination.

No elaborate discussion is required to demonstrate the soundness of the above cases. They held, as do all the cases, that only unjust discrimination is prohibited by the Federal statutes. And so it is that whether the common law rules as to unjust discrimination (which we say were

limited to the unreasonableness of the charge only), or whether Federal or State statutes against unjust discrimination are to be applied, is immaterial to the case of these claimants, for they are not insisting that the Court make any unjust discriminations, but only that in deciding the ancient issue of quantum meruit, it determine what was a reasonable charge in *each instance*.

## POINT 10.

NEITHER (A) THE STATE STATUTES, NOR (B) THE FEDERAL STATUTES CONDEMN DISCRIMINATION UNLESS THE SAME BE UNJUST DISCRIMINATION. ALL OR SUBSTANTIALLY ALL THE SHIPMENTS OF LOGS MOVING, RESPECTIVELY: TO THE APPELLEE AND CROSS-APPELLANT BROOKS-SCANLON CORPORATION FROM PERRY AND CARBUR, FLORIDA, TO EASTPORT, FLORIDA; AND TO THE APPELLEE AND CROSS-APPELLANT WILSON CYPRESS COMPANY FROM HINES, FLORIDA, TO PALATKA, FLORIDA; AND TO THE APPELLEE AND CROSS-APPELLANT CUMMER CYPRESS COMPANY FROM HOMOSASSA, FLORIDA, TO LACOOCHEE, FLORIDA; MOVED IN TRAINLOAD QUANTITIES, AND UNDER CIRCUMSTANCES AND CONDITIONS AND AT A COST SUBSTANTIALLY DIFFERENT FROM THE MOVEMENTS OF LOGS TO THE OTHER SHIPPERS IN FLORIDA DURING SAID RESTITUTION PERIOD. SUCH WAS THE EFFECT OF THE DECISION OF THE DISTRICT COURT DATED JANUARY 22ND, 1934, FILED JANUARY 26TH, 1934. A LOWER CHARGE FOR THE TRANSPORTATION OF LOGS FROM SUCH POINTS OF ORIGIN TO SUCH DESTINATIONS UNDER SUCH CIRCUMSTANCES CONSTITUTES NO DISCRIMINATION OF ANY SORT. IN APPLYING THE COMMON LAW STANDARD OF REASONABLENESS THE DISTRICT COURT SHOULD HAVE AWARDED RESTITUTION TO THESE APPELLEES AND CROSS-APPELLANTS UPON A BASIS SUBSTANTIALLY LOWER THAN THAT GENERALLY ESTABLISHED, VIZ., UPON A BASIS NOT SUBSTANTIALLY HIGHER THAN THE CUMMER SCALE.

**(This point is applicable to Assignments of Error numbered 14 to 23 of Brooks-Scanlon Corporation et al.)**

This point is made as above stated on behalf of Brooks-Scanlon Corporation, Wilson Cypress Company and Cum-

mer Cypress Company in their separate suit which has been here consolidated. The same point is made in similar language by Wilson Lumber Company of Florida in its separate suit here consolidated, viz:

> NEITHER (A) THE STATE STATUTES, NOR (B) THE FEDERAL STATUTES CONDEMN DISCRIMINATION UNLESS THE SAME BE UNJUST DISCRIMINATION. ALL OR SUBSTANTIALLY ALL THE SHIPMENTS OF LOGS MOVING TO THIS APPELLEE AND CROSS-APPELLANT AT PERRY, FLORIDA, MOVED UNDER CIRCUMSTANCES AND CONDITIONS AND AT A COST SUBSTANTIALLY DIFFERENT FROM THE MOVEMENTS OF LOGS TO THE SHIPPERS OF SINGLE CARLOADS IN FLORIDA DURING SAID RESTITUTION PERIOD. A LOWER CHARGE FOR THE TRANSPORTATION OF LOGS TO SUCH DESTINATION UNDER SUCH CIRCUMSTANCES CONSTITUTES NO DISCRIMINATION OF ANY SORT. IN APPLYING THE COMMON LAW STANDARD OF REASONABLENESS THE DISTRICT COURT SHOULD HAVE AWARDED RESTITUTION TO THIS APPELLEE AND CROSS-APPELLANT UPON A BASIS SUBSTANTIALLY LOWER THAN THAT GENERALLY ESTABLISHED, VIZ., UPON A BASIS NOT SUBSTANTIALLY HIGHER THAN THE CUMMER SCALE.
>
> **(This point is applicable to Assignments of Error numbered 12 to 21 of Wilson Lumber Company of Florida).**

Even if we assume that the Cummer Scale had no force or effect (not even prima facie force and effect) during the restitution period and is entitled to no weight as a State-made rate in applying the common law standard of reasonableness upon the issue of quantum meruit, we submit that the District Court should have awarded substantially larger sums to the appellees and cross-appellants Brooks-Scanlon Corporation, Wilson Cypress Company, Cummer Cypress Company and Wilson Lumber Company of Florida, respectively. We have pointed out (supra) that the logs moving during the restitution period to Brooks-Scanlon Corporation moved in trainload quantities from Perry and Carbur, Florida, to Eastport, Florida; that the logs moving to Wilson Cypress Company during the restitution period moved in trainload quantities from

Hines, Florida, to Palatka, Florida; that the logs moving to Cummer Cypress Company moved in trainload quantities from Homosassa, Florida, to Lacoochee, Florida. The log trains all moved on regular schedules under a service contract which required that all of the outbound product of the mills of those appellees and cross-appellants respectively be shipped out over the lines of the Atlantic Coast Line Railroad or its connections so long as the outbound charges of the Railroad Company were not higher than those of other carriers. No logs moved between these respective points of origin and destinations except in trainload quantities. And the Railroad Company had the benefit of the outbound product manufactured from the inbound logs. (R. 769, 770, 827, 828). The circumstances and low cost of the transportation has been discussed at length under Point 7, supra.

What has been said there in that connection is applicable here. We do not propose to repeat here what has been said there, except to briefly present some pertinent comparisons with respect to the Hines to Palatka movement of Wilson Cypress Company, which was the subject-matter of a more analytical scrutiny than any other of the trainload movements. Those comparisons are as follows:

| | |
|---|---|
| Average weight per car, approximately | 94,000 pounds |
| Average number of cars per train, approximately | 40 cars |
| Average revenue per car | $41.60 |
| The cost per car found by the Master to have been computed by the Interstate Commerce Commission, including $6.10 per car, representing a 5¾% return on investment, and $2.85 per car for taxes | $27.52 |
| The cost per car found by the Master to have been computed by the statistician of the Railroad Company, in- | |

| | |
|---|---|
| cluding $6.04 per car representing a 5¾% return on investment, and $2.82 per car for taxes..... | $27.18 |
| Maximum cost per car found by the Master to have been computed by the statistician of the appellees and cross-appellants, including $4.65 per car, representing a 5¾% return on investment, and $2.52 per car for taxes..... | $21.28 |
| Minimum cost per car found by the Master to have been computed by the statistician of the appellees and cross-appellants, including $3.99 per car, representing a 5¾% return on investment, and $2.11 per car for taxes..... | $18.21 |
| The charge fixed by the Master and the District Court as reasonable for all log movements in Florida during the restitution period and applicable between all points of origin and all destinations, as applied to those now under discussion, per car..... | $34.42 |

The cost studies of the statistician of the appellees and cross-appellants consisted almost wholly of revisions of those of the Interstate Commerce Commission and the Railroad Company's statistician, and the elimination or reduction of items not properly chargeable to the log traffic (pp. 74 to 77 of Exhibits). The average revenue earned by the Railroad Company during the restitution period was approximately 3.11% upon its system, and 1.7% in Florida, so obviously 5 3/4% ought not to have been included in the so-called costs of the Railroad Company and of the Interstate Commerce Commission.

We have shown under Points 8 and 9 (supra) that the Federal and State statutes regarding unjust discrimination (a) are not applicable in determining the reasonable-

ness of a past charge; (b) do not prohibit discrimination which is not unjust and which is founded upon different circumstances and conditions of movement, including costs; (c) do not prohibit the maintenance of point-to-point rates (lower than a general scale) over routes where the movement is heavy and the costs are lower even when future rates as distinguished from past charges are involved; and (d) contemplate that in determining the level of the inbound rates due weight shall be accorded to the fact that the carrier secures to itself the transportation of the outbound product.

Both the Master and the District Court (R. 197, 198, 352) recognized that the cost of transportation is substantially less in trainload quantities moving under circumstances set forth above than otherwise. But they felt bound to apply the general mileage charge found by the Master and the Court to be reasonable for application generally during the restitution period. We submit that for these reasons the Court and the Master misapprehended and misapplied the law, and that in applying the common law standard of reasonableness upon the issue of quantum meruit, the awards made to the claimants whose logs had moved under the circumstances as set forth above were entirely insufficient.

We may here point out that the revenue which the carrier would have derived under the Cummer Scale had that scale been applied during the restitution period would have been $20.48 per car. Even assuming that the Cummer Scale is entitled to no force or effect (not even prima facie force and effect) as a State-made rate during the restitution period, it must be borne in mind that the scale was voluntarily established by the carrier as a trainload rate nearly thirty years ago, and was voluntarily continued in force and effect for nearly twenty-five years. This fact is entitled to substantial weight in the determination of a reasonable charge upon the issue of quantum meruit.

L. & N. R. R. Co. v. Finn, 235 U. S. 601, 59 L. Ed. 379,

Service Lbr. Co. v. Sumter Valley R. Co. 67 Ore. 63, 135 P. 537.

We submit that the principles above referred to, and the pertinent facts set forth under this point, demonstrate that the amount which should have been awarded to the Wilson Cypress Company and the other claimants in a like or similar situation should have been substantially greater and should have been upon a basis not substantially different from the Cummer Scale, even if that scale were without force or effect. And if this Court shall find that the Cummer Scale had no force or effect during the restitution period and is entitled to no weight as a State-made rate in applying the common law standard of reasonableness, our view is that this Court should remand the cause to the District Court with directions to measure the restitution which has been awarded in accordance with the principles herein set forth and to award to the claimants respectively the amounts which they respectively are entitled to receive in accordance with such principles.

## POINT 11.

IN APPLYING THE COMMON LAW STANDARD OF REASONABLENESS TO THE CHARGES HERE INVOLVED, THE DISTRICT COURT IN AWARDING RESTITUTION UPON SUCH STANDARD SHOULD HAVE AWARDED TO THESE CROSS-APPELLANTS RESPECTIVELY A GREATER SUM THAN THE SUM SO AWARDED TO THEM RESPECTIVELY IN AND BY THE FINAL DECREE HEREIN, VIZ., NOT SUBSTANTIALLY LESS THAN THE AMOUNTS OF SUCH OVERCHARGES CLAIMED BY SAID CROSS-APPELLANTS RESPECTIVELY.

**(This point is applicable to Assignments of Error numbered 15, 16 and 17 of the State of Florida, et al., numbered 21, 22 and 23 of Brooks-Scanlon Corporation, et al., and numbered 19, 20 and 21 of Wilson Lumber Company of Florida.)**

All of the argument hereinbefore set forth is applicable

to this point. The law and the facts demonstrate that the claimants were entitled to restitution on the basis of the Cummer scale, but that if restitution is to be awarded on the basis of the common law standard of reasonableness, the claimants, respectively, are respectively entitled to more than was awarded them.

## CONCLUSION

We therefore conclude that it was the duty of the District Court to award restitution on the basis of the Cummer Scale and thus right the wrong done to these claimants by that Court in entering the wrong decree in the first instance, for such is the theory upon which restitution is founded. But if restitution is to be made on the basis of the common law standard of reasonableness, then we insist that as regards the large shippers here suing in their own right the evidence demonstrates that the prima facie validity of the Cummer Scale was never overcome. We assert that the rule of the common law required reasonableness of charges and not equality of charges, such reasonableness being based upon the circumstances and conditions of the transportation of the particular traffic involved. The Florida and Federal statutes have never modified this rule of the common law which is still in force in Florida. The provisions of the Interstate Commerce Act are not self-executing and have no effect upon intrastate rates until findings have been made and a valid order entered by the Interstate Commerce Commission, and then only as regards the future. Every order of the Interstate Commerce Commission prescribing intrastate rates must be prospective in its nature, and the order of the Interstate Commerce Commission made in July, 1932, with respect to the Florida intrastate log traffic by its terms dealt only with the future. It could and can have no effect upon then past shipments, which are the subject-matter of this controversy. We further submit that measured by the common law standard of reasonableness, upon the issue of quantum meruit, the claimants are severally entitled to restitution in greater amounts than those awarded to them severally by the District Court, even if the Cummer Scale

had no force or effect (not even prima facie force and effect) during the restitution period.

Respectfully submitted,

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# APPENDIX

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### Rates on Atlantic Coast Line Railroad During Period of Restitution.

In Cents Per 100 lbs.

| Miles | A | B | C | D | E | F | G | H | I | J | K |
|---|---|---|---|---|---|---|---|---|---|---|---|
| 5 | 1.71 | 2.50 | 2.14 | 1.80 | 1.77 | 1.76 | 2.00 | 1.83 | 1.56 | 1.44 | 2.23 |
| 10 | 1.71 | 2.50 | 2.14 | 1.80 | 2.06 | 1.76 | 2.00 | 2.11 | 1.95 | 1.80 | 2.23 |
| 15 | 1.71 | 3.00 | 2.40 | 2.13 | 2.06 | 2.06 | 2.50 | 2.50 | 2.6 | 2.40 | 2.56 |
| 20 | 1.71 | 3.00 | 2.40 | 2.13 | 2.06 | 2.06 | 2.50 | 2.62 | 2.6 | 2.40 | 2.56 |
| 25 | 1.71 | 3.50 | 2.75 | 2.62 | 2.35 | 2.35 | 3.00 | 2.88 | 2.99 | 2.76 | 2.88 |
| 30 | 1.71 | 3.50 | 2.75 | 2.62 | 2.46 | 2.35 | 3.00 | 3.00 | 2.99 | 2.76 | 2.88 |
| 35 | 1.71 | 4.00 | 2.88 | 2.88 | 2.46 | 2.45 | 3.00 | 3.25 | 3.12 | 2.88 | 3.22 |
| 40 | 1.71 | 4.00 | 2.88 | 2.88 | 2.58 | 2.45 | 3.00 | 3.37 | 3.12 | 2.88 | 3.22 |
| 45 | 2.10 | 4.50 | 3.25 | 2.88 | 2.70 | 2.58 | 3.50 | 3.50 | 3.51 | 3.24 | 3.68 |
| 50 | 2.10 | 4.50 | 3.25 | 3.25 | 2.70 | 2.58 | 3.50 | 3.50 | 3.51 | 3.24 | 3.68 |
| 55 | 2.10 | 4.50 | 3.50 | 3.50 | 2.70 | 2.93 | 3.50 | 3.62 | 3.77 | 3.48 | 3.68 |
| 60 | 2.10 | 5.00 | 3.50 | 3.50 | 2.70 | 2.93 | 4.00 | 4.00 | 3.77 | 3.48 | 4.01 |
| 65 | 2.30 | 5.00 | 3.75 | 4.00 | 3.06 | 2.93 | 4.00 | 4.12 | 4.09 | 3.77 | 4.08 |
| 70 | 2.30 | 5.00 | 3.75 | 4.00 | 3.06 | 3.95 | 4.00 | 4.25 | 4.09 | 3.77 | 4.08 |
| 75 | 2.30 | 5.50 | 4.00 | 4.25 | 3.06 | .... | 5.00 | 4.37 | 4.35 | 4.02 | 4.41 |
| 80 | 2.30 | 5.50 | 4.00 | 4.25 | .... | .... | 5.00 | 4.62 | 4.35 | 4.02 | 4.41 |
| 85 | 2.30 | 5.50 | 4.25 | 4.62 | .... | 3.05 | 5.00 | 4.75 | 4.61 | 4.26 | 4.41 |
| 90 | 2.30 | 6.00 | 4.25 | 4.62 | .... | .... | 5.00 | 4.87 | 4.61 | 4.26 | 4.78 |
| 100 | 2.60 | 6.00 | 4.50 | 5.00 | .... | 3.17 | 5.00 | 5.87 | 4.87 | 4.50 | 4.84 |
| 110 | 2.80 | 6.50 | 4.62 | 5.38 | 4.10 | 4.10 | 6.50 | 5.50 | 5.00 | 4.62 | 5.24 |
| 120 | 3.20 | 6.50 | 5.00 | 5.63 | 4.10 | 4.10 | 6.50 | 5.62 | 5.39 | 4.98 | 5.38 |
| 130 | 3.20 | 7.00 | 5.12 | 6.13 | 4.10 | 4.10 | 7.00 | 5.75 | 5.52 | 5.10 | 5.71 |
| 140 | 3.40 | 7.00 | 5.12 | 6.25 | .... | .... | 7.00 | 6.00 | 5.52 | 5.10 | 5.78 |
| 150 | 3.40 | 7.50 | 5.50 | 6.75 | .... | .... | 7.50 | 6.25 | 5.98 | 5.52 | 6.11 |
| 160 | 3.40 | 7.50 | 5.75 | 7.13 | .... | .... | 7.50 | 6.37 | 6.24 | 5.76 | 6.11 |
| 170 | 3.70 | 8.00 | 6.25 | 7.38 | .... | 4.20 | 8.00 | 6.50 | 6.76 | 6.24 | 6.54 |

A. The Cummer Scale.

B. The so-called Interstate Commerce Commission scale, likewise applicable intrastate in Virginia and Alabama.

C. The short log (not over 6 feet in length) scale, applicable intrastate in Florida (Claimant's Ex. 2-A).

D. North Carolina scale (Prescribed by N. C. Corp. Comm. in 1923) (Perrin Ex. 2).

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E. North Carolina scale (Prescribed in A. C. L. I. C. C. B-2248, see Claimant's Ex. 13-A).

F. North Carolina scale of intrastate rates (See Claimant's Exhibits 17-A and 18-A). Applicable from 85 points of origin to 13 destinations (corrected from feet to cents per 100 lbs. on basis of 12 lbs. to the foot of logs).

G. South Carolina scale (Perrin Exhibit 2).

H. Georgia scale (See Claimant's Exhibit 12-A2).

I. 65 per cent. of Florida Intrastate Lumber Rate.

J. 60 per cent. of Florida Intrastate Lumber Rate.

K. The charge fixed by the District Court herein.

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### Rates Per Car Regardless of Weight Established Since Restitution Period.

| Exhibit Number | Railroad | Tariff No. | Application |
|---|---|---|---|
| 4-A | Southern Ry., and A.G.S.RR; C.N.O. & T.P.Ry | I.C.C. A-10425, Supp. 5 | To Chattanooga, Tenn., From: *ON SOU. RY.* Chattanooga to and including Aragon, Ga. Rome, Ga., to and including Early, Ga. Atalla, Ala. to and including Turkeytown, Ala. Chattanooga to and including Concord, Tenn. Between Cleveland, Tenn. and Cahutta, Ga. Harriman, Tenn., to and including Donovan, Tenn. Oliver Springs, Tenn., to and including Big Mountain, Tenn.<br>Chattanooga to and including Huntsville. Rome, Ga., to and including Hematite, Ga.<br>ON A. G. S. RR.:<br>Chattanooga to and including Gilbert, Ala.<br>ON C. N. O. & T. P. RY.:<br>Chattanooga to and including Lancing, Tenn. |
| 4-A | Southern Ry., and A.G.S.RR. and C.N.O. & T.P.Ry. | ICC A-10425 Supp. 7 | To Mobile and Selma and York from all Sou. Ry. stations in Ala. to York from A. G. S. R. R. stations in Ala. and Miss.<br>To Knoxville, Tenn., from Sou. Ry. stations; to Dayton, Tenn., from C. N. O. & T. P. stations; to Fayette, Ala. (50 miles only) from Sou. Ry. stations.<br>To Dayton, Tenn., from Sou. Ry. and A. G. S. R. R. stations (except no rates provided under 50 miles). |
| 8-A | Southern Ry. | ICC A-10472 | To Corinth, Miss., from Sou. Ry. stations to and including Decatur, Ala.; and to and including Memphis, Tenn. |
| 8-A | Southern Ry. | ICC A-10448 Supp. 2 | To Memphis, Tenn., from Sou. Ry. stations to and including Corinth, Miss. |

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| Exhibit Number | Railroad | Tariff No. | Application |
|---|---|---|---|
| 4-A | C.of Ga. Ry. | ICC 2867 | To Dothan and Montgomery, Ala.;<br>FROM:<br>Eufala to Dingley, Ala., inclusive; Eagle Pond, Ga., to Florala, Ala., inclusive; Lakewood, Fla.<br>Tullis to Springer, Ala., inclusive;<br>Girard to Brantley, Ala., inclusive. |
| 4-A | C.& G. Ry. | ICC 36 Supp. 11 | To Columbus, Greenville, Greenwood, Means, and West Point, Miss. Also, 125 miles $22.50; 150 miles, $25.00; and 170 miles, $27.50. |
| 4-A | G.& S.I. R.R. | ICC No. 7789 IC. R.R. | To Jackson and Laurel, Miss. |
| 4-A | L.& N. R.R. | ICC A-16022 Supp. 19 | All stations, except Ala. intrastate, and except from, to or between points in Ill., Ind., Mo., and/or Ohio, except that rates apply to Cincinnati, or Evansville on traffic from south of Ohio River except from Covington, Newport, Louisville, Henderson and Owensboro, Ky. |
| 4-8 | G.M.& N. R.R. | ICC 1137 | All stations. |
| 8-A | S.A.L. Ry. | ICC A-7630 | To Montgomery, Ala., from stations between Omaha, Ga., and Montgomery, Ala. |
| 8-A | N.O.& N.E.R.R. | ICC 3101 | To Laurel, Miss., from N. O. and N. E. stations. |
| 8-A | W.Ry. of Ala., and B.& S.E. R.R. | ICC A-129 Sup. 2 | To Montgomery, and Selma, Ala., from B. & S. E. stations; to Montgomery and Selma, Ala., from W. Ry. of Ala. stations. |
| 6-A | A.T.& N. R.R. | 44-D | To Russwood, Ala., from particular stations, $12.00; $15.00; and $18.00. |
| 6-A | A.T.& N. R.R. | 14-A, Supp. 20 | To Mt. Vernon, Ala., and York, Ala., also publishes $24.00 from 118 miles. |

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| Exhibit Number | Railroad | Tariff No. | Application |
|---|---|---|---|
| 4-A | T.A.& G. Ry. | Speiden, ICC A-659, Supp. 120 | To Chattanooga, Tenn. and Gadsden, Ala. |
| 8-A | T.A.& G, Ry. | Speiden, ICC A-659, Supp. 120 | To-Chattanooga, Tenn. and Gadsden, Ala. |
| 8-A | I.C.R.R. and Y.& M.V.R.R. | ICC 7835 Supp. 10 | From I. C. stations to Corinth, Durant, Fernwood, Grenada, Jackson, McComb, Pickens, Vaiden, and Water Valley, Miss.; Dyersburg and Jackson, Tenn., East Cairo, Henderson, Hickman, Hopkinsville and Paducah, Ky.; and Ponchatoula, La.; To Cairo and Mound City, Ill.; from all I. C. stations in Ill., and from East Cairo, Ky. to Medina, Tenn., inclusive, and from Paducah, Ky., to Gates, Tenn., incl. |
| 8-A | I.C.R.R. and Y. & M.V.R.R. | ICC 7798, Supp. 2 | To Memphis from I. C. R. R. and Y. & M. V. R. R. stations. |
| 8-A | Y.& M.V. R.R. | ICC 7811 Supp. 2 | To Vicksburg, Miss., from Y. & M. V. stations between and including Tallulah to Delta Point, La., $17.00 per car. |
| 7-A | I.C.R.R. and Y.& M.V.R.R. | ICC 7848, Supp. 5 | To Memphis from Y. & M. V. stations. |
| 7-A | I.C.R.R. and Y.& M.V.R.R. | ICC 7748, Supp. 5 | To Tallulah, La., from I. C. R. R. and Y. and M. V. stations in Miss. Also 125 miles, $27.50. |
| 14 | I.C.R.R. | ICC 7786 Supp. 3 | From all I. C. R. R. stations to Corinth, Fernwood, Grenada, Jackson, McComb, Pickens, and Water Valley, Miss.; Dyersburg and Jackson, Tenn.; and Ponchatoula, La. |

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| Exhibit Number | Railroad | Tariff No. | Application |
|---|---|---|---|
| 14 | Y.& M. V.R.R. | ICC 7810, Supp. 4 | To Charleston, Clarksdale, Gloster, Greenville, Greenwood, Grenada, Hickory, Holcomb, Jackson, Kings, Lambert, Meridian, Natchez, Phillip, Stevenson, Tehula, Trotters Point, Vicksburg and Yazoo City, Miss., and Denham Springs, La., from Y. & M. V. R. R. stations. |
| 6-A | N.C.& ST.L.Ry. | Lumber Tariff No. 9 Supp. Y.Y.etc. | All stations in Alabama. |
| 12-A | N.C.& St.L.Ry. | ICC A-755, Supp. 24 (Speiden) | Intrastate in Georgia. |
| 13 | N.C.& St.L.Ry. | Rate Issue 41296, Supp. 7 | Intrastate in Tennessee. |
| 14 | N.C.& St.L.Ry. | ICC 3284-A | Interstate all stations. |
| 14 | M.& O. R.R. | ICC B-860 Supp. 1 | To Columbus, Corinth and Meridian, Miss.; Humboldt and Jackson, Tenn.; Mobile and Whistler, Ala., and Wickliffe, Ky. |
| 5 (first reference) | St. L. S.F.Ry. | Frt. Tariff 3155, Supp. 17 | To all Fla., Ala., and Miss. stations. |
| 4-A. | Mo. Pac. R.R. | ICC A-8212 | Between stations in Ark., La., (except from or to Gouldsboro, Gretna, Harvey, Manero, New Orleans, Westwego), Missouri (except from or to points north of Bismark or Carthage, Mo., except from Hopewell, Irondale, Mineral Point, Potosi and Summitt, Mo., when destined to Warren, Ark.,) and Oklahoma, on interstate traffic, and between stations on Doniphan, Kinsett and Searcy, Ry., and stations in Louisiana, Missouri and Oklahoma except as noted above. Also publishes rates of $27.50 a car to Cape |

**PAGE B-5**

| Exhibit Number | Railroad | Tariff No. | Application |
|---|---|---|---|
| | | | Geraideau, Mo. from Black River, Case, Corning, Delaplaine, Dicus, Giles, Hooker, Knobel, Lafe, Luerhman, Moark, Mollus, Murta, Okean, Peach Orchard, Sellmeyer and Stonewall, Ark. Also publishes rate of $82.50 a car from Hoxie, Ark., to Walnut Ridge, Ark. |
| 4-A. | St. L. S.W.Ry. | ICC 4676, Supp. 8 | Between stations in Ark., La., and Mo., (except St. Louis). |
| | | | Between stations in Ark. and Memphis, Tenn. |
| 5-A. | St. L. S.F.Ry. | ICC 9346, Supp. 22 | To Hope, Ark., from America, Bokhoma, Garvin, Haworth, Idabel, Kullituklo, Lockwood, Log, Millerton, Moon and Valiant, Okla. |
| 7-A. | St.L. S.F.Ry. | ICC 9642, Supp. 5 | To Fayette Jct., Ark., Fayetteville, Ark., and Ft. Smith, Ark., from stations in Ark. and Missouri. |
| 5-A. | C.R.I. & P. | ICC C-12292 | Intrastate in Ark., and La., and Interstate between the two. Stations in Ark. and La. to Memphis, Tenn. |

## PAGE C

### Revenue Per Minimum Carload Under Certain Rates in Effect Throughout Restitution Period.

| Miles | Cummer Scale | Fla. Short Log Scale A.C.L. and S.A.L. | A.C.L. General (N.C.) Scale | A.C.L. Point to Point (N.C.) Scale | General Ga. Scale | S.A.L. (Fla.) Scale | I.C.C. Scale |
|---|---|---|---|---|---|---|---|
| 5 | $8.55 | $8.55 | $7.20 | $7.42 | $7.32 | $9.85 | $10.00 |
| 10 | 8.55 | 8.55 | 7.20 | 7.42 | 8.44 | 9.85 | 10.00 |
| 15 | 8.55 | 9.50 | 8.55 | 8.65 | 10.00 | 9.85 | 12.00 |
| 20 | 8.55 | 9.50 | 8.55 | 8.65 | 10.50 | 9.85 | 12.00 |
| 25 | 8.55 | 11.00 | 10.50 | 9.87 | 11.50 | 11.80 | 14.00 |
| 30 | 8.55 | 11.00 | 10.50 | 9.87 | 12.00 | 11.80 | 14.00 |
| 35 | 8.55 | 11.50 | 11.50 | 10.33 | 13.00 | 13.80 | 16.00 |
| 40 | 8.55 | 11.50 | 11.50 | 10.33 | 13.50 | 13.80 | 16.00 |
| 45 | 10.50 | 13.00 | 13.00 | 10.85 | 14.00 | 13.80 | 18.00 |
| 50 | 10.50 | 13.00 | 13.00 | 10.85 | 14.00 | 13.80 | 18.00 |
| 55 | 10.50 | 14.00 | 14.00 | 12.32 | 14.50 | 15.75 | 18.00 |
| 60 | 10.50 | 14.00 | 14.00 | 12.32 | 16.00 | 15.75 | 20.00 |
| 65 | 11.50 | 15.00 | 16.00 | 12.32 | 16.50 | 15.75 | 20.00 |
| 70 | 11.50 | 15.00 | 16.00 | 12.85 | 17.00 | 15.75 | 20.00 |
| 75 | 11.50 | 16.00 | 17.00 | ..... | 17.50 | 17.73 | 22.00 |
| 80 | 11.50 | 16.00 | 17.00 | ..... | 18.50 | 17.73 | 22.00 |
| 85 | 11.50 | 17.00 | 18.50 | 12.85 | 19.00 | 19.73 | 22.00 |
| 90 | 11.50 | 17.00 | 18.50 | ..... | 19.50 | 19.73 | 24.00 |
| 95 | 13.00 | 18.00 | 20.00 | ..... | 20.50 | 21.67 | 24.00 |
| 100 | 13.00 | 18.00 | 20.00 | 13.30 | 21.50 | 21.67 | 24.00 |
| 110 | 14.00 | 18.50 | 21.50 | 17.26 | 22.00 | 21.67 | 26.00 |
| 120 | 16.00 | 20.00 | 22.50 | 17.26 | 22.50 | 21.67 | 26.00 |
| 130 | 16.00 | 20.50 | 24.50 | 17.26 | 23.00 | 23.63 | 28.00 |
| 140 | 17.00 | 20.50 | 25.00 | ..... | 24.00 | 23.63 | 28.00 |
| 150 | 17.00 | 22.00 | 27.00 | ..... | 25.00 | 25.60 | 30.00 |
| 160 | 17.00 | 23.00 | 28.50 | ..... | 25.50 | ..... | 30.00 |
| 170 | 18.50 | 25.00 | 29.50 | ..... | 26.00 | ..... | 32.00 |

## APPENDIX NO. 2

**The Interstate Commerce Act, (41 Stat. L., 474):**

Section 3:

"(1) That it shall be unlawful for any common carrier subject to the provisions of this Act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular persons, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

Section 13:

(3) Whenever in any investigation under the provisions of this Act, or in any investigation instituted upon petition of the carrier concerned, which petition is hereby authorized to be filed, there shall be brought in issue any rate, fare, charge, classification, regulation, or practice, made or imposed by authority of any State, or initiated by the President during the period of Federal control, the Commission, before proceeding to hear and dispose of such issue, shall cause the State or States interested to be notified of the proceeding. The Commission may confer with the authorities of any State having regulatory jurisdiction over the class of persons and corporations subject to this Act with respect to the relationship between rate structures and practices of carriers subject to the jurisdiction of such State bodies and of the Commission; and to that end is authorized and empowered, under rules to be prescribed by it, and which may be modified from time to time, to hold joint hearings with any such State regulating bodies on any matters

wherein the Commission is empowered to act and where the rate-making authority of a State is or may be affected by the action taken by the Commission. The Commission is also authorized to avail itself of the cooperation, services, records, and facilities of such State authorities in the enforcement of any provision of this Act.

(4) Whenever in any such investigation the Commission, after full hearing, finds that any such rate, fare, charge, classification, regulation, or practice causes any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce, which is hereby forbidden and declared to be unlawful, it shall prescribe the rate, fare, or charge, or the maximum or minimum, or maximum and minimum, thereafter to be charged, and the classification, regulation, or practice thereafter to be observed, in such manner as, in its judgment, will remove such advantage, preference, prejudice, or discrimination. Such rates, fares, charges, classifications, regulations, and practices shall be observed while in effect by the carriers parties to such proceeding affected thereby, the law of any State or the decision or order of any State authority to the contrary notwithstanding."

Section 15a:

"(2) In the exercise of its power to prescribe just and reasonable rates the Commission shall initiate, modify, establish or adjust such rates so that carriers as a whole (or as a whole in each of such rate groups or territories as the Commission may from time to time designate) will, under honest, efficient and economical

management, and reasonable expenditures for maintenance of way, structures and equipment, earn an aggregate annual net railway operating income equal, as nearly as may be, to a fair return upon the aggregate value of the railway property of such carriers held for and used in the service of transportation. Provided, That the Commission shall have reasonable latitude to modify or adjust any particular rate which it may find to be unjust and unreasonable, and to prescribe different rates for different sections of the country."

(3) The Commission shall from time to time determine and make public what percentage of such aggregate property value constitutes a fair return thereon, and such percentage shall be uniform for all rate groups or territories which may be designated by the Commission. In making such determination it shall give due consideration, among other things, to the transportation needs of the country and the necessity (under honest, efficient and economical management of existing transportation facilities) of enlarging such facilities in order to provide the people of the United States with adequate transportation: Provided, That during the two years beginning March 1, 1920, the Commission shall take as such fair return a sum equal to 5½ per centum of such aggregate value, but may, in its discretion, add thereto a sum not exceeding one-half of one per centum of such aggregate value to make provision in whole or in part for improvements, betterments or equipment, which, according to the accounting system prescribed by the Commission, are chargeable to capital account.

(4) For the purposes of this section, such aggregate value of the property of the carriers shall be determined by the Commission from time to time and as often as may be necessary. The Commission may

utilize the results of its investigation under section 19a of this Act, insofar as deemed by it available, and shall give due consideration to all the elements of value recognized by the law of the land for rate-making purposes, and shall give to the property investment account of the carriers only that consideration which under such law it is entitled to in establishing values for rate-making purposes. Whenever pursuant to section 19a of this Act the value of the railway property of any carrier held for and used in the service of transportation has been finally ascertained, the value so ascertained shall be deemed by the Commission to be the value thereof for the purpose of determining such aggregate value.

(5) Inasmuch as it is impossible (without regulation and control in the interest of the commerce of the United States considered as a whole) to establish uniform rates upon competitive traffic which will adequately sustain all the carriers which are engaged in such traffic and which are indispensable to the communities to which they render the service of transportation, without enabling some of such carriers to receive a net railway operating income substantially and unreasonably in excess of a fair return upon the value of their railway property held for and used in the service of transportation, it is hereby declared that any carrier which receives such an income so in excess of a fair return, shall hold such part of the excess, as hereinafter prescribed, as trustee for, and shall pay it to, the United States.

(6) If, under the provisions of this section, any carrier, receives for any year a net railway operating income in excess of 6 per centum of the value of the railway property held for and used by it in the service of transportation, one-half of such excess shall be placed in a reserve fund established and maintained

by such carrier, and the remaining one-half thereof shall, within the first four months following the close of the period for which such computation is made, be recoverable by and paid the Commission for the purpose of establishing and maintaining a general railroad contingent fund as hereinafter described. For the purposes of this paragraph the value of the railway property and the net railway operating income of a group of carriers, which the Commission find are under common control and management and are operated as a single system, shall be computed for the system as a whole, irrespective of the separate ownership and accounting returns of the various parts of such system. In the case of any carrier which has accepted the provisions of section 209 of this amendatory Act the provisions of this paragraph shall not be applicable to the income for any period prior to September 1, 1920. The value of such railway property shall be determined by the Commission in the manner provided in paragraph (4)."